

Indiana Law Review



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TRIBUTE

A TRIBUTE TO KEN STROUD

JAMES W. TORKE*

Ken Stroud joined the faculty in 1972. I remember the occasion very well because, in an accidental way, I had something to do with the law school's good fortune.

In the summer of 1972, having completed my first year of teaching, I was assigned to teach the basic course in constitutional law. Ordinarily, this was a four-credit offering, but in order to fit it into the summer session, it was offered, on a one-time-only basis, for three hours. This special-bargain offer apparently caught the students' fancy, for over two hundred signed up. I felt somewhat overwhelmed by the prospect of grading some two hundred exams and appealed to Dean Bill Foust for some relief. Happily, Bill Foust thought he knew just the young man who might be able and, most importantly, willing, to step in on short notice. That young man was Ken Stroud, who at the time was working as a law clerk for Justice Roger DeBruler on the Indiana Supreme Court. Ken accepted the offer, and the law school has been richer ever since.

At Bill Foust's suggestion, Ken Stroud called me to get his bearings. We agreed to meet in my office. I assumed he must be either an intrepid or a very rash fellow to agree to teach constitutional law on less than a week's notice. When he entered my office, I was immediately struck by his forthright, down-to-earth, and cheerfully purposive manner. Our conversation took off with ease. It was soon clear to me that if he was intrepid, he was not rash; he had already given much thought to the subject. And I was also discovering that talk with Ken Stroud can flow like a river. Our friendship, and conversation, began then and has flourished ever since.

Ken acquitted himself so well that summer that he was offered a post as a visiting professor for the fall term. With hardly a pause, he took on the course in corporations—the one and only time, I think, that he ever taught it. A month and a half into the fall semester, the faculty was so pleased with his work that he was hired as a full-time, tenure-track professor. So it was much by good chance that Ken Stroud began his twenty-six year teaching career at the law school.

* * *

Ken Stroud grew up in Indianapolis. He attended Cathedral High School where he played a key role in its football powerhouses of the early 1950s,

* Professor of Law, Indiana University School of Law—Indianapolis.

receiving All-City honors in 1952 as a guard. After a year at Purdue University, where he discovered that engineering was not his metier, he joined the Army. He was accepted for special training in radio electronics, a program in which he found a special advantage in working amidst older and well-educated draftees. So the Army taught him about radios and, at Fort Huachuca, Arizona, where he was ultimately stationed, gave him a chance to play some more football; but, most importantly, his time in the service was formative in an unexpected way, for it was in the Army that he "began to read books" in a serious way.

After his military stint, he enrolled at Indiana University on the G.I. Bill. In two years, he earned a bachelor's degree with a straight-A record and was elected to Phi Beta Kappa. Encouraged by one of his professors, he applied to Indiana University School of Law in Bloomington. A quick acceptance coupled with a sizeable scholarship offer enticed him to study law, which surely, at least to my mind, was his calling. In 1961, he earned his law degree and was elected to the Order of the Coif. But his intellectual thirst was only the more whetted, and he stayed in school for two more years of graduate study, this time in the philosophy of science. In 1963, he became an Assistant U.S. Attorney in the Southern District of Indiana.

Anyone who knows Ken Stroud knows that he led a life of physical as well as mental vigor. His on-the-road motorcycle (mo-tor-sickle, as he would say it) and whitewater rafting adventures are well-worn, but always well-told, tales. Then, not long after he began to practice law, serious injuries suffered in a motorcycle accident required years of convalescence and rehabilitation. He emerged to take a position as a law clerk with his former classmate, Justice Roger DeBruler, from whence he came to us.

* * *

University faculty are judged in three areas: teaching, scholarship, and service. Ken Stroud met the standards for each and became a tenured, full professor in 1978. His resume attests to his scholarly work. In addition to his several articles and manuals, he is the author of *Indiana Appellate Practice*, a standard guide for Indiana lawyers, which is in its second edition. His teaching efforts came to focus on criminal law, evidence, and appellate practice. In addition to teaching the basic courses in criminal law and evidence, he combined his areas of expertise with his criminal appellate work and created the course in appellate practice. What made this course uniquely rigorous was its use of live criminal appeals. During his academic career, Ken maintained a steady criminal appellate practice. Several of his pro bono clients—including the notorious Steven Judy—faced the death penalty, and two of his cases led to petitions for certiorari in the U.S. Supreme Court. As attorney of record, Ken utilized his cases as the focus of the appellate practice course. Week by week, he guided his students through each step in the appellate process culminating in an end-product that was tested in an actual judicial decision. He merged his legal and philosophical interests in his seminars in law and psychiatry, bio-ethics, and civil disobedience, which were always heavily enrolled. He was a superb classroom teacher who took his principal task—to train lawyers—with high seriousness.

His beginning students were always warned that they were being armed with lethal powers to do good or to do evil. His impact as a classroom teacher was confirmed by his students who, following his first year of teaching, chose him as the Outstanding New Teacher and three times thereafter awarded him the Black Cane Award as the outstanding teacher on the faculty. In addition to his pro bono representation of appellants in criminal cases, he served the University and the law school generously, for many years shouldering the chairmanships of a variety of crucial committees.

These categories of performance, as useful as they may be for organizing *curricula vitae* and awarding promotion and tenure, tend to mask, perhaps even distort, what the whole person brought to the institution. Ken Stroud's resume lists the basic data, but hardly hints at, much less displays, what he most importantly contributed to his colleagues and his students.

* * *

Ken Stroud is a consummate teacher. I have already reported the regard his students had for him. But beyond this, he is a teacher for all who will listen. Those of his colleagues and friends who read this tribute will understand what I mean when I say that he was my best teacher, that much of what I might have achieved as a teacher and scholar was built on lessons I learned from Ken Stroud.

His art is made up of three parts: hard work and thorough preparation; intellectual rigor and honesty; and, perhaps his rarest gift, an ability to engage others in conversation as supple, clear, and lively as a spring stream.

I have said that his teaching began with hard work and thorough preparation. I have known no other colleague who, right up to his retirement, put so much effort into preparation for each class. I experienced this ethic over the many summers in which other colleagues and I joined Ken in the study of legal philosophy. In those summers, I learned from him what it takes to gain a full and honest understanding of a text. The preparation, care, and discipline that he brought to this task became our prescription and rule. As a student and a thinker, he was adventurous but never satisfied with an easy understanding or superficial chatter. To every topic, he brought a broadly-informed mind that was without ostentation, an intellectual rigor free of rigidity, and a seriousness of purpose without self-importance. He always, in a favorite phrase of his, "stayed on the merits." Old friends have often heard him invoke his "spiral theory" of thought. To my understanding, the spiral theory is a way of looking at the world with a lawyerly eye: as soon as you come to grasp an argument from one side, you must turn and attack it from the other, and so on in an ever-rising spiral of insight. Thought never comes to rest.

I have noted that Ken Stroud has a special gift as a talker. In argument, he can be bold, muscular, aggressive, and even, with the right opponent, ferocious; but he is never unkind nor ever a bully. In conversation, he possesses an ease that can engage a great spectrum of people for, like any good talker, he has a universal interest in life.

He applied a comparable intensity and ethic to issues that arose within the law school. Discussion at faculty meetings was never complete without Ken

Stroud's measured analysis. I will always be able to hear him beginning, "It seems to me there are three separate issues involved here," and then, issue by issue, taking the problem apart to reveal its crux. He treated with moral care and concern not only the legal texts with which he worked, but also the people and the world around him. He acted from a sense of what had to be done, never for power or praise or for glory.

So it is the ethics of thought, the responsibilities of collegueship, and the example of a moral life which Ken Stroud most importantly brought to the law school. And it is these qualities that will most be missed when he retires.

In *The Meditations*, Marcus Aurelius lists some of the virtues which he had learned from the example of his friend and fellow Stoic, Maximus:

[T]o be of good cheer in illness and in all other misfortunes: a well-balanced disposition, sweet temper, dignified bearing; to perform one's appointed task without resentment; the fact that all men trusted him to mean what he said and to do whatever he did without malice; to be immune to surprise, undaunted, never hasty, dilatory or at a loss, never to be downcast or sneering or again angry or suspicious, but generous, forgiving, and truthful; to give the impression of one who cannot be corrupted rather than of one who has been reformed. Also that no one thought himself slighted by him, or would venture to consider himself his superior.¹

He could have been writing of Ken Stroud.

1. Marcus Aurelius, I THE MEDITATIONS 15 (G.M.A. Grube trans., Hackett 1983).

ARTICLES

THE CONTINGENT EMPLOYEE BENEFITS PROBLEM

MARK BERGER*

Americans have increasingly come to understand the central role that work plays in adult life. Part of that role is a reflection of the self-identity and social associations generated by the workplace. Individuals often define themselves by the kind of work they perform, and frequently form their closest friendships with workplace colleagues.¹ Perhaps more central, however, is the economic role of work. Simply put, most individuals look at work as a means of securing the resources required to purchase the necessities and luxuries of life.²

Obviously, the more a worker earns through employment, the better position he or she is in to succeed in the marketplace as a consumer. Higher salaries are likely to mean better housing, a better car, more entertainment and greater economic security. But at the turn of the century, the economic aspects of work have come to mean more than simply the search for a higher salary to allow for

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1. See Glenn Burkins, *A Special News Report About Life On the Job and Trends Taking Shape There*, WALL. ST. J., Nov. 4, 1997, at A1 (reporting that employees say they are generally happier and more productive when they have friendships in the workplace); Jolie Solomon, *Workplace: Love at the Workplace, But No Labor's Lost*, WALL. ST. J., Aug. 22, 1990, at B1 (reporting on a study revealing that strong bonds and relationships in the workplace help employees perform their jobs and enliven the atmosphere for their co-workers; most of the respondents surveyed indicated that these relationships made them more creative, productive and happy).

2. An indication of the critical importance of earnings from work to the economic well-being of Americans is the increasing number of families who depend upon multiple wage earners. The Bureau of Labor Statistics reported that in 1996 more than half of all families had a husband and wife both working, a figure which was nearly three times that of "traditional" families in which only the husband worked. BUREAU OF LABOR STATISTICS, U. S. DEP'T OF LABOR, EMPLOYMENT CHARACTERISTICS OF FAMILIES SUMMARY 1 (May 21, 1998) (visited Nov. 1, 1998) <<http://stats.bls.gov/news.release/famee.t02.htm>> [hereinafter BUREAU OF LABOR STATISTICS I]. See also *More Families Have Two Incomes, BLS Says*, 158 Lab. Rel. Rep. (BNA) 147 (June 1, 1998). In 1947, just over one third of American families had two wage earners compared to 57% in 1994. These two-wage families averaged an income 80% higher than single-worker families. See *Where Both Spouses Work*, U.S. NEWS & WORLD REP., Aug. 19, 1996, at 13.

more and better quality purchases. The workplace has also become the focal point for securing a number of critical and often expensive employment-related benefits. These benefits include such essentials as health insurance and pensions, and in some employment settings, the chance to participate in the employer's financial success through employee stock purchase plans.

While workplace benefits such as pensions, health insurance and stock purchase plans might not have been common or considered critical to employees in the early part of the Twentieth Century, this is no longer the case in contemporary American society. Americans are now living longer, and it has therefore become increasingly important for them to secure a source of income after the conclusion of their work careers.³ At the same time, medical costs have grown so rapidly that the lack of health insurance can mean the inability to secure needed medical assistance.⁴ Stock purchase plans, although less widespread, have nevertheless become a source of wealth creation for many employees,⁵ and

3. A male aged 65 will have a life expectancy of 20.5 years in the year 2000, compared to 17.8 years in 1983 and 19.3 years in 1989. See John M. Bragg, *New Mortality Table Shows Up on Annuity Block*, NAT'L UNDERWRITER LIFE AND HEALTH-FIN. SERVS. ED., Jan. 20, 1997, at 8. Social Security has been a major source of post-retirement income, but the upcoming retirement of the baby-boom generation will require significant changes in the system if it is to survive. Younger workers frequently express doubt that the system will be available for them when their turn to retire arrives. Unless the Social Security program is changed, by 2029 it will have a deficit of nearly \$200 billion a year (in 1996 dollars), with payroll taxes able to cover only 77% of benefits. See Barry Rehfeld, *Fixing Social Security*, INSTITUTIONAL INVESTOR, Dec. 1996, at 82. Reform proposals include permitting individuals to invest some of their Social Security contributions in the equity market. See Christopher Georges, *Overhaul of Social Security is Endorsed by Panel*, WALL ST. J., May 18, 1998, at A3; *Clinton Plan for '99 Social Security Reforms Debated*, 157 Lab. Rel. Rep. (BNA) 466 (Apr. 20, 1998).

4. Over 40 million Americans currently have no health insurance coverage and are therefore deterred from seeking needed medical assistance. See Michael Cherhew et al., *The Demand for Health Insurance Coverage by Low-Income Workers: Can Reduced Premiums Achieve Full Coverage?*, HEALTH SERVICES RES., Oct. 1, 1997, at 453. Even the movement to managed care has not stopped the upward spiral in health care costs, although it may have slowed the rate of increase. See Jeffrey A. Tannenbaum, *Health Costs at Small, Midsize Firms Finally Fell Last Year, Survey Shows*, WALL ST. J., Sept. 11, 1997, at B2 (reporting health care costs at small and mid-size firms rising 6.2% in 1993, 3.4% in 1994, 1.6% in 1995, and dropping 1.6% in 1996); Joseph B. White & Rhonda L. Rundle, *Big Companies Fight Health-Plan Rates*, WALL ST. J., May 19, 1998, at A2. Many workers have been dropping employer-sponsored health insurance because of the increase in required employee contributions to total insurance costs. See Laurie McGinley, *More Workers Drop Health Insurance From Employers*, WALL ST. J., Nov. 10, 1997, at B2.

5. For example, Wal-Mart's stock purchase plan has provided significant financial rewards to many of its employees. See Sam Walton & John Huey, *The Secret of Wal-Mart's Success*, MONEY, July 1, 1992, at 24 (reporting that Wal-Mart's stock plan was available to every associate who had been with Wal-Mart at least one year and who worked at least 1000 hours a year). See also Elizabeth Seay, *Scrambling for Security: How Four Americans Spend and Save*, WALL ST. J., Dec. 12, 1997, at R5.

a significant feature in such industry sectors such as software and computers.⁶ However, despite the increasing importance of programs connected with health, retirement, and economic security, they are still largely associated with traditional employment relationships and often represent a significant cost to those employers which provide them.⁷

In response to the expansion in the scope and cost of workplace benefit programs, many employers have attempted to develop human resource systems which eliminate the need to offer fringe benefit plans, or at least restrict the group of eligible workers entitled to participate in them. To achieve this result, some employers simply discontinue providing employment-related benefits because offering them is generally not required by law.⁸ However, this is not always possible because eliminating benefit programs may make it difficult to attract and retain critical employees. As an alternative, employers have increasingly begun to utilize contingent employment relationships in which workers are hired directly for limited assignments or are retained through outside staffing agencies instead of being made a part of the employer's permanent work

6. E.g., Microsoft stock rose 80% during 1997, resulting in employee stock options that averaged \$1 million. See Allan Sloan, *Millionaires Next Door: That Is, If Your Neighbors Work for Microsoft*, NEWSWEEK, Dec. 8, 1997, at 56. This employee incentive accounts for the largest outstanding financial obligation of Microsoft. See Michelle Elarier, *To Have and To Have Not*, CFO, Mar. 1998, at 58-61. See generally Allan Sloan et al., *The New Rich*, NEWSWEEK, Aug. 4, 1997, at 48.

7. See Joseph B. Mosca, *The Restructuring of Jobs for the Year 2000*, PUBLIC PERSONNEL MGMT., Mar. 1, 1997, at 43 (reporting that as health care costs increase, benefit packages are costing companies from 25% to 32% of total personnel compensation, and that benefit costs have risen at annual rate of 6.2%, a figure in excess of the rate of inflation). See also Fred R. Bleakley, *HMO Talks Could Spell Biggest Cost Rise in 4 Years*, WALL ST. J., July 18, 1997, at A9A; Christina Duff, *Compensation Costs Climb for Employers*, WALL ST. J., July 31, 1998, at A2; Louis Hau, *Rate Increases to Help HMOs' Boost Earnings as Enrollment Growth Slows*, WALL ST. J., July 20, 1998, at B5H. It has been argued that the system of employer-provided benefits distorts the employer-employee relationship and should be replaced by non-profit, private sector buying cooperatives. See Craig J. Cantoni, *Manager's Journal: The Case Against Employee Benefits*, WALL ST. J., Aug. 18, 1997, at A14.

8. See Federal Insurance Contribution Act ("FICA"), I.R.C. §§ 3101-3128 (1994 & Supp. II 1996), amended by I.R.C. § 3121 (West Supp. 1998). Employers are required to contribute to the Social Security and Unemployment Insurance programs for their employees, Federal Unemployment Tax Act ("FUTA"), 26 U.S.C.A. §§ 3301-3311 (1994 & Supp. II 1996), amended by I.R.C. §§ 3301, 3304, 3306, 3309 (West Supp. 1998), but the federal government does not mandate any additional pension or health care benefit programs for employees. Nor are such programs generally required by the states, although there are exceptions. See, e.g., HAW. REV. STAT. § 21-393 (1985) (requiring mandatory pre-paid health insurance for eligible employees). A recent survey revealed that small employers may be eliminating health care and retirement benefits despite a tight labor market; while 46% of the small business surveyed offered such programs in 1996, that number had dropped to 39% in 1998. Rodney Ho, *Fewer Small Businesses Are Offering Health Care and Retirement Benefits*, WALL ST. J., June 24, 1998, at B2.

force.⁹ Typically, employers continue to provide the normal array of workplace benefits to those in traditional employment positions, but deny equivalent treatment to those in contingent employment relationships.¹⁰ The result is a two-

9. There is no uniformly accepted definition of contingent employment other than a consensus that it is a relationship which differs from the pattern of full-time work for an indefinite period. It normally is considered to include such forms as part-time and short-term hirings, as well as leased employment and independent contractor arrangements. See STANLEY NOLLEN & HELEN AXEL, *MANAGING CONTINGENT WORKERS* 9 (1996); Mark Berger, *Unjust Dismissal and the Contingent Worker: Restructuring Doctrine for the Restructured Employee*, 16 YALE L. & POL'Y REV. 1, 9-18 (1997). The Bureau of Labor Statistics defines contingent employment as "almost any work arrangement that might be considered to differ from the commonly perceived norm of a full-time wage and salary job." BUREAU OF LABOR STATISTICS, U. S. DEP'T OF LABOR, *CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS*, REP. 900, at 1 (Aug. 17, 1995) [hereinafter BUREAU OF LABOR STATISTICS II]. According to recent studies, the number of temporary workers has increased more than fivefold since 1982, rising from 417,000 in 1982 to 2.3 million in 1996. See Mary Jane Fisher, *Closing the Benefits Gap for Temps and Contingent Workers*, NAT'L UNDERWRITER LIFE AND HEALTH-FIN. SERVICES EDITION, Apr. 14, 1997, at 54. According to a National Association of Temporary and Staffing Services survey, the daily employment of temporary help increased 10.7% in the first quarter of 1998. 158 Lab. Rel. Rep. (BNA) 382 (July 20, 1998).

10. One study noted that "a much smaller share of workers in nonstandard jobs have either health insurance or a pension compared to regular full-time workers." ECONOMIC POL'Y INST., *NONSTANDARD WORK, SUBSTANDARD JOBS: FLEXIBLE WORK ARRANGEMENTS IN THE U.S.* 29 (1997). A report on federal temporary help practices revealed that federal temporary workers are ineligible for participation in the federal employee retirement system and are not provided with Government-sponsored life insurance. They may participate in the health insurance program after one year of service, but without the 70% contribution to premium costs the Government makes for its permanent work force. U.S. MERIT SYSTEMS PROTECTION BOARD, *TEMPORARY FEDERAL EMPLOYMENT: IN SEARCH OF FLEXIBILITY AND FAIRNESS, A REPORT CONCERNING SIGNIFICANT ACTIONS OF THE U.S. OFFICE OF PERSONNEL MANAGEMENT* 12 (1994). See also, BENNETT HARRISON & BARRY BLUESTONE, *THE GREAT U-TURN: CORPORATE RESTRUCTURING AND THE POLARIZING OF AMERICA* 46 (1988); Steven Hipple & Jay Steward, *Earnings and Benefits of Contingent and Noncontingent Workers*, MONTHLY LAB. REV., Oct. 1, 1996, at 22-30; "Contingent" Work Force Expands Rapidly as Firms Seek Buffers in Economic Downturns, 1985 Daily Lab. Rep. (BNA) No. 138, at A3 (July 18, 1985); *Contingent Workers Unfairly Deprived of Benefits, Job Security, Senate Panel Told*, 1993 Daily Lab. Rep. (BNA) No. 114, at d11 (June 16, 1993) (reporting on job restructuring undertaken by the Bank of America, which resulted in the conversion of 58% of its staff to hourly or temporary positions without the opportunity to receive benefits); *GAO Finds Greater Use of Contingent Workers, Warns of Strain on Income Protection System*, 1991 Daily Lab. Rep. (BNA) No. 59, at A1 (Mar. 27, 1991) (reporting concerns of Representative Tom Lantos that the rise of contingent employment practices creates the risk of shifting the costs of income protection and benefits from employers to workers and taxpayers). Responding to proposals to expand the definition of independent contractors for federal tax purposes, Secretary of the Treasury Robert Rubin expressed concern that such changes "could lead to widespread shifting of employees to independent contractor status, resulting in loss of worker

tier employment structure, with those in the lower tier usually excluded from all benefit program eligibility.

For some workers the loss of benefit eligibility may not be an insurmountable problem. This is true, for example, for those covered under the benefit program of a spouse or parent. Others who secure insurance through professional organizations such as the American Bar Association are in the same position. For the remainder, however, the inability to obtain coverage under an employer's benefit plan may well mean the inability to secure any benefits at all. When the benefits involved are as central as health insurance and a pension, serious economic hardship could result for those affected. Yet, this is exactly what has been happening to contingent workers.

The de-linking of benefit program participation from the employment relationship through the use of contingent employment arrangements was illustrated in recent litigation involving the Microsoft Corporation ("Microsoft").¹¹ A decision by a panel of the Ninth Circuit Court of Appeals held that certain contract workers for Microsoft were entitled to participate in the company's § 401(k) deferred compensation program as well its employee stock purchase plan even though they had signed an employment agreement recognizing that they were ineligible.¹² Subsequently, the core features of the decision were affirmed by the Ninth Circuit Court of Appeals in an en banc ruling, although questions concerning the interpretation of the deferred compensation plan document were remanded to the plan administrator for further consideration.¹³ Given the widespread practice of not providing benefits to

protections such as pension and health coverage." James Kuhnenn, *Going for Home-Based Businesses? Bills Could Mean Lower Federal Taxes, But Provision on Independent Contractors Could Put Some in a Bind*, KANSAS CITY STAR, June 28, 1997, at B1.

11. *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th Cir. 1996) [hereinafter Microsoft Corp. I], *aff'd on reh'g*, 120 F.3d 1006 (9th Cir. 1997) (en banc) [hereinafter Microsoft Corp. II], *cert. denied*, 118 S. Ct. 899 (1998). A separate law suit has also been filed against Microsoft challenging the company's practice of denying temporary workers various health and pay benefits, as well as eligibility for stock options. The attorney for the plaintiffs indicated that class action status will be sought. *See Ten Microsoft Temps File Law Suit Alleging Unequal Treatment*, WALL ST. J., Nov. 20, 1998, at A6.

12. *Microsoft Corp. I*, 97 F.3d at 1187.

13. *Microsoft Corp. II*, 120 F.3d 1006 (9th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 899 (1998). Prior to the start of litigation, Microsoft altered its employment structure in an effort to avoid any possibility of having to pay benefits to its contingent work force in the future. It did this by terminating what it had hoped was an independent contractor employment system and replacing it with the use of personnel provided by an employment leasing agency. *Id.* at 1009. The District Court, on remand, found that the plaintiff class includes former Microsoft contract workers secured through employment leasing agencies who nevertheless met the standards for classification as common law employees of Microsoft. *Vizcaino v. Microsoft Corp.*, No. C393-1780, 1998 WL 122084 (W.D. Wash. Feb. 13, 1998). Whether or not they are entitled to participation in all of the Microsoft benefit plans at issue, however, remains to be decided. *See* 1998 Daily Lab. Rep. (BNA) No. 138, at E11 (July 20, 1998); Lee Gomes, *America 1998: High on Stock Options: At Microsoft*,

members of the non-regular work force,¹⁴ the decision in the *Microsoft* case understandably raised concern among business interests.¹⁵

While an employer may be able to avoid some of the costs associated with employee benefits by supplementing core employees with contingent workers, it is also possible to take the further step of converting an existing work force into a contingent employee system. The result is that workers who had been covered by the employer's benefit plans will find themselves instantly excluded following the conversion. Where such plans are covered by the Employment Retirement Income Security Act ("ERISA"),¹⁶ however, the conversion may suggest that the employer is interfering with his workers' access to benefits in violation of the statutory prohibition contained in section 510 of ERISA.¹⁷ The Supreme Court addressed such a challenge in *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Sante Fe Railway Co.*,¹⁸ but its ruling left the scope of ERISA's protection of benefit eligibility unclear. Nevertheless, the decision in *Inter-Modal*, in much the same fashion as the *Microsoft* ruling, demonstrates that there is an urgent need to address the benefit questions raised by the contingent employment phenomenon.

This Article, therefore, focuses on the problem of workplace benefits and

a *War Smolders Between Haves and Have-Nots*, WALL ST. J., Aug. 10, 1998, at B1.

14. See *supra* note 10.

15. See James P. Baker, *As a Result of the 9th Circuit's En Banc Ruling in the 'Microsoft' Case, Contingent Workers Who Had Agreed to Give Up Benefits Should Receive Them Retroactively*, 20 NAT'L L.J. 5, Sept. 29, 1997, at B5 (noting that the *Microsoft* cases seem to set a "dangerous precedent for employers" because they allow independent contractors who had agreed to forego employment benefits in exchange for more pay to receive the benefits retroactively); Susan L. Coskey, *Vizcaino v. Microsoft Corporation; A Labor and Employment Lawyer's Perspective*, 48 LAB. L.J. 91, 91-97 (1997); see also Michael A. Lawson et al., *Temp Workers May Be Eligible for Plan Benefits*, 19 NAT'L L.J. 26, Feb 24, 1997, at C2; Charles McCoy & David Bank, *Microsoft Loses Appeal in Worker-Benefits Case*, WALL ST. J., July 25, 1997, at A3. More recently, the Department of Labor demonstrated the government's concern that businesses may be misusing the contingent employee system to deprive workers of benefits by filing a suit against Time Warner seeking independent court review of the company's personnel policies. See Jacob M. Schlesinger & Eben Shapiro, *U.S. Challenges Time Warner on Benefits*, WALL ST. J., Oct. 27, 1998, at B20.

16. Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461 (1994 & Supp. II 1996), amended by Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788-1103 (Aug. 5, 1997).

17. Pub. L. No. 93-406, title I, § 510, 88 Stat. 895 (codified at 29 U.S.C. § 1140 (1994)). This section of ERISA makes it unlawful for any person to discharge, fine, suspend, expel, discipline or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan.

Id.

18. 117 S. Ct. 1513 (1997).

their relationship to contingent employment work arrangements. Initially, this Article explores the nature of contingent employment relationships and the various kinds of workplace benefits employees have come to rely upon. Following that is an analysis of the Ninth Circuit Court of Appeals rulings in the *Microsoft* case allowing contract workers to participate in company benefit plans, and the Supreme Court decision in *Inter-Modal* applying ERISA to the conversion of an employer's permanent work force into a leased staff. The Article then considers how courts in general have responded to efforts by contingent employees to secure various workplace benefits. Finally, proposed legislative and non-governmental solutions to the benefit problems of contingent employees are analyzed.

I. EMPLOYMENT RELATIONSHIPS AND THE BENEFIT MIX

Until recently, Americans have shared a common perception that employment meant a continuous job of indefinite duration. The offer of a job and its acceptance by the applicant was understood to imply that there would be no abrupt or arbitrary termination even if the parties never discussed a time frame for the position.¹⁹ Of course, this was never true for all workers in all situations. A college student, for example, might seek full-time employment for only the summer vacation period, or an office worker with clerical skills might accept a limited term assignment through a temporary help agency. But these exceptions did not alter the fact that typically employment was assumed to be continuous and without a fixed end.

Nevertheless, even jobs with indefinite terms of employment have not been understood as lifetime positions. For example, workers can expect to lose their jobs permanently if the employer goes out of business, or temporarily if there is a sudden downturn in production.²⁰ Similarly, it is accepted that employees may be let go because of poor work performance or some specific act of misconduct.²¹

19. See WILLIAM B. GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* 30 (1993); PAUL OSTERMAN, *EMPLOYMENT FUTURES: REORGANIZATION, DISLOCATION AND PUBLIC POLICY* 66 (1988); PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 144-45 (1990).

20. The impact of permanent job loss can be mitigated if the employer provides severance payments to terminated workers. The Supreme Court has held that state severance laws which mandate such payments are not preempted by ERISA. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 3, 4 (1987). Additionally, for employers large enough to qualify, there may be an obligation to provide advance notice of large scale layoffs, whether permanent or temporary, pursuant to the federal Worker Adjustment and Retraining Notification Act ("WARN"). 29 U.S.C. §§ 2101-2109 (1994 & Supp. II 1996).

21. As Professor Paul Weiler has observed, workers may well expect to avoid termination unless the misconduct was sufficiently severe and then only after alternative punishments have proven ineffective:

The standard expectation in the real world of work is that the employee will keep his job unless he does something wrong—in the sense of some specific misconduct or a general

But beyond circumstances of this sort, there has been a shared expectation among both employers and employees that the job-holder would have uninterrupted employment unless there was some reason to terminate the relationship.

That these expectations have existed is somewhat ironic given the fact that the law until recently has offered very little protection to individuals who have been discharged. In formal terms most employment has been classified legally as at-will, a status which allows the employer to discharge the employee for good reason, bad reason, or no reason at all.²² Treatise writer H. G. Wood described the concept in the Nineteenth Century, writing:

With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.²³

Subsequently, this principle was affirmed in decisions of the U.S. Supreme Court.²⁴ Nevertheless, the fact that the employer has always had the power to discharge without cause has not altered the general worker expectation of employment continuity.

In more recent years, however, the expectation of job continuity has begun to receive some measure of support from the legal system. One aspect of this is reflected in the numerous anti-discrimination laws which protect employees from discharge based upon specific prohibited reasons such as race and sex under Title

pattern of poor performance—and as a consequence forfeits the position. Indeed, a further feature of the social mores at work is that even if an employee does something wrong—for example, if he takes a day off without a legitimate reason, it will not cost him his job immediately; he will be dismissed only if the bad act is part of a broader pattern of unsuitable behavior which has not been corrected by the employer with less severe disciplinary measures.

WEILER, *supra* note 19, at 52 (1990).

22. See, e.g., *Gordon v. Matthew Bender & Co.*, 562 F. Supp. 1286 (N.D. Ill. 1983); *Hutton v. Watters*, 179 S.W. 134 (Tenn. 1915); *Payne v. Western & Atl. R.R. Co.*, 81 Tenn. 507 (1884). See generally Jay M. Feinman, *The Development of the Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

23. H. G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (William S. Hein & Co. 1981) (1877) (citations omitted). However, commentators have maintained that the cases upon which Wood relied did not support his statement of the rule. See Feinman, *supra* note 22; Matthew W. Finkin, *The Bureaucratization of Work: Employer Policies and Contract Law*, 1986 WIS. L. REV. 733, 734-35; Clyde W. Summers, *The Contract of Employment and The Rights of Individual Employees: Fair Representation and Employment At Will*, 52 FORDHAM L. REV. 1082, 1083 & n.7 (1984) (stating that "cases cited by Wood did not support his proposition"); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341 n.54 (1974).

24. *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adair v. United States*, 208 U.S. 161 (1908).

VII of the Civil Rights Act of 1964,²⁵ age under the Age Discrimination in Employment Act,²⁶ and disabilities under the Americans With Disabilities Act.²⁷ Further strengthening expectations of job continuity has been the virtual revolution in state common law which has substantially modified the at-will rule. As a result of court decisions in the 1970s and 1980s most states now permit an employee to challenge a termination that was based upon reasons that violate state public policy.²⁸ Additionally, many state courts have developed common law principles that allow them to imply contract-based rights to employment premised upon specific actions taken by the employer,²⁹ or that establish a general contract right requiring that the employer adhere to the standard of good faith and fair dealing.³⁰ All of these developments, at both the state and federal level, recognize that the at-will employment rule, which precluded court

25. 42 U.S.C. §§ 2000e to 2000e-17 (1994 & Supp. II 1996).

26. 29 U.S.C. §§ 621-634 (1994 & Supp. II 1996).

27. 42 U.S.C. §§ 12101-12213 (1994 & Supp. II 1996).

28. The origins of the public policy exception to the at-will employment rule are generally traced to *Petermann v. International Brotherhood of Teamsters*, 344 P. 2d 25 (Cal. Ct. App. 1959), in which the court upheld a wrongful discharge claim following the termination of an employee who refused instructions to commit perjury before a grand jury. More recently, many courts have expanded the public policy theory beyond refusals to commit a crime, and have included terminations stemming from the employee's reporting of a crime, performance of public duty, and exercise of public rights. See *Pro v. Donatucci*, 81 F.3d 1283 (3d Cir. 1996); *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353 (Ill. 1978); *Frampton v. Central Ind. Gas Co.*, 297 N.E.2d 425 (Ind. 1973); *Palmer v. Brown*, 752 P.2d 685, 687-88 (Kan. 1988); *Sventko v. Kroger Co.*, 245 N.W.2d 151 (Mich. Ct. App. 1976); *Phipps v. Clark Oil & Refinery Corp.*, 408 N.W.2d 569, 571 (Minn. 1987) (performing a public duty); *Boyle v. Vista Eyewear Inc.*, 700 S.W.2d 859 (Mo. Ct. App. 1985); *Potter v. Village Bank of N.J.*, 543 A.2d 80, 86 (N.J. Super. Ct. App. Div. 1988); *Nees v. Hocks*, 536 P.2d 512 (Or. 1975) (en banc); *Reuther v. Fowler & Williams, Inc.*, 386 A.2d 119 (Pa. Super. Ct. 1978); *Ludwick v. This Minute of Carolina, Inc.*, 337 S.E.2d 213 (S.C. 1985). One court has gone so far as to extend public policy protection to an armored car driver who left his vehicle to assist an individual who was being chased by a man with a knife. See *Gardner v. Loomis Armored Inc.*, 913 P.2d 377 (Wash. 1996) (en banc).

29. See *Wagner v. City of Globe*, 722 P.2d 250 (Ariz. 1986) (en banc); *Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917 (Cal. Ct. App. 1981); *Cleary v. American Airlines, Inc.*, 168 Cal. Rptr. 722 (Cal. Ct. App. 1980); *Watson v. Idaho Falls Consol. Hosp., Inc.*, 720 P.2d 632 (Idaho 1986); *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880 (Mich. 1980); *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257 (N.J. 1985), *modified*, 499 A.2d 515 (N.J. 1985); *Weiner v. McGraw-Hill, Inc.*, 443 N.E.2d 441 (N.Y. Ct. App. 1982); *Benoit v. Ethan Allen, Inc.*, 514 A.2d 716 (Vt. 1986); *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081 (Wash. 1984) (en banc).

30. See *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988); *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96 (Del. 1992); *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977); *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974). However, other courts have rejected this theory. See *Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661 (Mo. 1988); *Murphy v. American Home Prods., Inc.*, 448 N.E.2d 86 (N.Y. Ct. App. 1983).

supervision of the decision to terminate an employee, must in certain circumstances give way to other interests. In so doing, the courts have increased the stability of traditional employment relationships³¹ by extending legal supervision to cover discharge decisions that offend selected public interests.

However, the generally accepted view that whether or not protected by law, employment relationships should be stable and continuous has come under intense pressure.³² In an increasingly competitive global business environment, employers have sought to limit what they see as the costs associated with traditional employment relationships. By avoiding commitments for indefinite employment, employers believe they can maintain flexibility to respond to varying business conditions.³³ If there is a temporary upturn in work requirements, the need can be met through the hiring of a temporary pool of workers. If production needs subsequently decrease, the workers can then be easily released. An employer might still face the necessity of retaining a core of traditional permanent employees to maintain essential continuity in production, but the costs of expanding and contracting the work force beyond that level are likely to be minimal.³⁴ As a result of this approach, the American labor market

31. While it may be true that workers are moving between jobs at a significant rate, this may obscure the degree to which workplace stability still survives. One researcher reported that although average job tenure for white males was just under four years, this figure hid the fact that the average tenure for white males for jobs *currently held* was 18 years. OSTERMAN, *supra* note 19, at 45. This reflects a pattern of experimenting with different jobs during the early stages of an individual's work life, followed by eventually settling in to a long-term job. Evidence exists, however, which suggests decreasing job stability in the United States. See Kenneth A. Swinnerton & Howard Wial, *Is Job Stability Declining in the U.S. Economy?*, 48 INDUS. & LAB. REL. REV. 293 (1995).

32. Americans have become accustomed to corporate layoffs even by financially healthy employers. See, e.g., Stephen E. Frank, *American Express Plans Lay-offs of 3,300*, WALL ST. J., Jan. 28, 1997, at A2 (lay-offs planned despite "solid" fourth-quarter earnings and a return on equity of 22.8%); Matt Murray, *Thanks, Goodbye: Amid Record Profits, Companies Continue to Lay Off Employees*, WALL ST. J., May 4, 1995, at A1 (citing lay-offs by Procter & Gamble Co., American Home Products Corp., Sara Lee Corp. and Banc One Corp.). An expanding economy may have slowed the rate of job loss in the mid-1990s, but worker displacement has continued. See Steven Hipple, *Worker Displacement in an Expanding Economy*, MONTHLY LAB. REV., Dec. 1, 1997, at 26, 26-39. Moreover, many of those terminated during the early 1990s recession have found recovery difficult due to apprehensions about the future. See Tony Horwitz, *Home Alone 2: Some Who Lost Jobs in Early '90s Recession Find a Hard Road Back*, WALL ST. J., June 26, 1998, at A1.

33. See EDWARD A. LENZ, CO-EMPLOYMENT: EMPLOYER LIABILITY ISSUES IN THIRD-PARTY STAFFING ARRANGEMENTS 10 (1997); Robert J. Grossman, *Short-Term Workers Raise Long-Term Issues*, HR MAG., Apr. 1, 1998, at 80, 81-82; Gregory L. Hammond, *Flexible Staffing Trends and Legal Issues in the Emerging Workplace*, 10 LAB. LAW. 161, 167-70 (1994).

34. This pattern has been called the core-periphery model, about which one researcher observed:

By establishing a labor force that is smaller than that actually required for normal production levels, the firm is able to offer that labor force relative security. In return,

has experienced dramatic growth in the utilization of non-traditional contingent labor to the point that contingent employees now represent the fastest growing segment of the domestic work force.³⁵

Although there is no generally accepted definition of contingent employment, the widespread awareness of the growth of non-traditional work patterns has led the Bureau of Labor Statistics (the "Bureau") to undertake surveys of non-continuous employment relationships in the United States. The Bureau defined the category of contingent employment as including "those individuals who did not [perceive themselves as having] an implicit or explicit contract for ongoing employment."³⁶ The definition was framed broadly enough to include "almost any work arrangement that might be considered to differ from the commonly perceived norm of a full-time wage and salary job."³⁷ The Bureau's survey of contingent employment in 1995, broadly construed, revealed a category totaling approximately six million persons, or 2.4-4.9% of the American work force.³⁸ Other estimates, however, have placed contingent employment at a higher level, suggesting that it may constitute as much as 30% of the domestic working population, with a rate of increase 75% higher than that of the overall work

these employees are willing to work under the salaried model and to provide both flexibility and commitment to the firm. The peripheral labor force provides the firm with a buffer against either macroeconomic—cyclical—downturns or labor force reductions necessitated by technical change.

OSTERMAN, *supra* note 19 at 85.

35. See Richard S. Belous, *The Rise of the Contingent Work Force: The Key Challenges and Opportunities*, 52 WASH. & LEE L. REV. 863, 867-68 (1995) (estimating that contingent employees represent between 25% and 30% of the American work force and have been growing at a rate 40% to 75% faster than the overall work force). A study published by the Economic Policy Institute came up with a comparable figure, concluding that "29.4% of all jobs were in nonstandard work arrangements . . ." ARNE L. KALLEBERG ET AL., NONSTANDARD WORK, SUBSTANDARD JOBS: FLEXIBLE WORK ARRANGEMENTS IN THE U.S. 1 (Economic Pol'y Inst. 1997). See also Charles S. Clark, *Contingent Work Force*, CQ RESEARCHER, Oct. 24, 1997, at 939 (reporting that the number of temporary workers grew 500% from 1980-96); Angela Clinton, *Flexible Labor: Restructuring the American Work Force*, MONTHLY LAB. REV., Aug. 1, 1997, at 3, tbl. 2 (reporting the growth of the business services industry at an annual rate of 6.9% since 1972, and 5.8% since 1988); *Employment: Global Companies Hiring More Temps; Trend Expected to Grow, Survey Finds*, 1995 Daily Lab. Rep. (BNA) No. 180, at d21 (Sept. 18, 1995).

36. BUREAU OF LABOR STATISTICS II, *supra* note 9, at 2. Elsewhere it has been suggested that the category should include individuals who "have little or no attachment to the company at which they work." NOLLEN & AXEL, *supra* note 9, at 5.

37. BUREAU OF LABOR STATISTICS II, *supra* note 9, at 1.

38. *Id.* A second survey released in December 1997, reported that the percentage of contingent workers had declined to between 1.9% and 4.4% of the American work force. BUREAU OF LABOR STATISTICS, U. S. DEP'T OF LABOR, CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS 1 (Feb. 1997) (visited Nov. 1, 1998) <<http://stats.bls.gov/news.release/conemp.nws.htm>> [hereinafter BUREAU OF LABOR STATISTICS III].

force.³⁹ Nevertheless, that there is no consensus concerning the extent of contingent employment relationships in the American economy does not alter the fact that it has become an increasingly significant employment pattern in recent years.⁴⁰

There are a mix of work relationships included within the contingent employment category. One variant is the temporary job which an individual may take for a limited period of time. Manpower, Inc., reportedly the largest private employer in the United States, has provided workers for this kind of assignment for approximately fifty years.⁴¹ The typical pattern is that the temporary help agency will either find skilled personnel or recruit and train the needed workers, thereafter referring them to employers who have listed available temporary positions.⁴² This has become an increasingly significant form of employment, now extending well beyond clerical jobs to include professional positions such as attorneys,⁴³ journalists,⁴⁴ and even physicists.⁴⁵

If an employer needs the services of a work force or of individual workers for a more extended period of time, other contingent employment arrangements may be required. One pattern is to employ the services of an employee leasing firm to perform the function of providing the work force and managing all related payroll and human resource services.⁴⁶ It is possible in this type of arrangement for the supplied workers to either be supervised by the contracting firm or to be part of a self-contained and supervised crew provided by the leasing company.

39. See Belous, *supra* note 35, at 867; see also NOLLEN & AXEL, *supra* note 9, at 9-11 (estimating the contingent employee population at 25% of the American work force and explaining the difference as based upon the overcounting of permanent core workers who may be part time, and the failure to account for temporary help who are not secured through temporary help agencies). For a critical analysis of the alternative definitions given to contingent employment, see Gillian Lester, *Careers and Contingency*, 51 STAN. L. REV. 73, 78-86 (1998).

40. Surveys undertaken by the Conference Board in 1990 and 1995 indicated a growth from 12% to 35% of surveyed employers who expected that their work force would involve at least 10% contingent employee utilization in the near future. See *Employment: Global Companies Hiring More Temps; Trend Expected to Grow, Surveying Finds*, 1995 DAILY LAB. REP. (BNA) No. 180, at d21 (Sept. 18, 1995). Another survey revealed that 60% of employers increased their utilization of contingent workers over a five-year period. *Contingent Workers: Use of Contingent Workers Grows Over Five-year Span, Survey Finds*, 1996 DAILY LAB. REP. (BNA) No. 136, at d8 (July 16, 1996).

41. See JEREMY RIFKIN, *THE END OF WORK* 190 (1995) (reporting a total of 560,000 Manpower employees).

42. See LENZ, *supra* note 33, at 10-11.

43. See Vincent R. Johnson & Virginia Coyle, *On the Transformation of the Legal Profession: The Advent of Temporary Lawyering*, 66 NOTRE DAME L. REV. 359 (1990).

44. See Shella P. Calamba, *At Big Dailies, More News Jobs Are Temporary*, WALL ST. J., Aug. 26, 1996, at B1.

45. See G. Pascale Zachary, *Looking For a Real Rocket Scientist? Manpower to Offer Physicists as Temps*, WALL ST. J., Nov. 27, 1996, at A4.

46. See LENZ, *supra* note 33, at 11-12; Hammond, *supra* note 33, at 163-67.

Indeed, an employer may even decide to subcontract an entire assignment, such as guarding the employer's premises or operating a data processing center, or outsource core production tasks, despite the fact that these may be essential functions of the business.⁴⁷

Separately, if an employer does not wish to use the services of a firm specializing in providing workers, it may choose instead to directly contract with individuals for specific projects or for limited-term employment. Here, the individual will be an employee of the employer in all respects, but without the continuity which typifies traditional permanent employment.⁴⁸ Moreover, in such arrangements the employer has the option of avoiding a common law employment relationship entirely if enough independence is granted to the contracting worker so that he or she will be considered an independent contractor under common law standards.⁴⁹

Regardless of the specific form that the contingent employment relationship may take, such workers face serious problems in securing the various kinds of benefits the American work force has come to expect. The Bureau of Labor Statistics' survey of contingent employment, in particular, revealed that contingent employees are far more likely to work without fringe benefit programs as compared to traditional permanent workers.⁵⁰ While this may not be an issue for those who have benefits from some other source, such as an employed spouse or a professional organization, the problem can be a serious one if the contingent wage earner is entirely dependent on himself for economic support and has no other feasible way to secure affordable insurance or future retirement income.⁵¹

47. See generally Elizabeth MacDonald, *Big Consultants Broke Records in '97 Revenues*, WALL ST. J., June 15, 1998, at B13D; Christopher J. Sheehan, *Outsourcing Continues to Serve New Markets*, THE OFFICE, Sept. 1993, 46-47; *Canadian Auto Workers Target Outsourcing Trend*, WALL ST. J., July 20, 1998, at A16.

48. See NOLLEN & AXEL, *supra* note 9, at 186-87. Courts have held that contract employees are not protected against the non-renewal of their contracts, even if the reason for termination violates state public policy. *Luethans v. Washington Univ.*, 894 S.W.2d 169 (Mo. 1995) (en banc). Some courts have extended this result to include employees covered by collective bargaining agreements. See, e.g., *Egan v. Wells Fargo Alarms Serv.*, 23 F.3d 1444 (8th Cir. 1994); *Phillips v. Babcock & Wilcox*, 503 A.2d 36 (Pa. Super. Ct. 1986). See generally Berger, *supra* note 9.

49. Independent contractor status means that the employer is free from many of the regulations which pervade the employer-employee relationship, including the obligation to pay federal employment taxes. See NOLLEN & AXEL, *supra* note 9, at 188, 190-91. The Internal Revenue Service ("IRS") utilizes a 20-factor test to distinguish employees from independent contractors, Rev. Rul. 87-41, 1987-1 C.B. 296, and has published a training manual to assist in making the classification. INTERNAL REVENUE SERVICE, DEPARTMENT OF THE TREASURY, *EMPLOYEE OR INDEPENDENT CONTRACTOR?* (1996).

50. BUREAU OF LABOR STATISTICS III, *supra* note 38, at 3-4 (reporting that one in five contingent workers had employer-provided health insurance compared to one in two traditional workers, and that only one in four contingent workers was eligible to participate in an employer-provided pension plan compared to nearly one-half of all traditional workers).

51. In fact, current estimates are that a total of approximately 44 million Americans, or one

The importance of workplace benefits in the American economy can be seen in the dramatic increase in the percentage that benefits represent of total employee compensation. According to U.S. Chamber of Commerce estimates, employee benefits accounted for 3% of total compensation paid to employees in 1929, but this figure had risen to 41.9% by 1996.⁵² While some of these costs represent required benefits, such as Social Security⁵³ and Unemployment Insurance,⁵⁴ others reflect programs which have become increasingly important in the contemporary economic environment, though not mandatory.

Among the workplace benefits Americans have become increasingly dependent upon are those that provide health insurance both for the individual and for his or her dependents. If health insurance coverage is provided in connection with employment, the employer will often contribute to the overall premium costs.⁵⁵ Even if that is not the case, the employer may be able to secure

out of every six, lack any medical insurance coverage whatsoever. This is an increase over the estimated 37 million who lacked medical insurance in 1993, and includes not only the unemployed, but also those whose employers have chosen to drop medical insurance for their employees. See Brian J. LeClair, *What About a Bill of Rights for the Uninsured?*, N.Y. TIMES, July 28, 1998, at A19. See also Edwin Chen, *Health Care Bill Travels Rugged Road of Reform*, L.A. TIMES, Feb. 4, 1996, at A1; *Insurance Reform Bill Takes Small Step in Right Direction*, MOD. HEALTHCARE, Aug. 12, 1996, at 25. Under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), 29 U.S.C. §§ 1161-1168 (1994 & Supp. II 1996), a discharged employee may be entitled to continued medical insurance under the employer's medical plan for up to three years, but the cost must be born entirely by the employee, and that is likely to make it a severe economic burden for someone who has just lost his source of regular income. Individual Retirement Accounts ("IRAs") are available for workers who wish to put aside funds for retirement, but there is no required employer contribution and there is a \$2000 per year maximum for employee contributions. See I.R.C. § 408(a)(1) (1994). This may be a welcome additional retirement planning vehicle for some, but lower-end contingent employees are less likely to have excess money available for the purpose of retirement saving.

52. UNITED STATES CHAMBER OF COMMERCE, 1997 Employee Benefits Report, *reprinted* in MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW 456 (4th ed. 1998) [hereinafter 1997 Employee Benefits Report].

53. Federal Old-Age, Survivors, and Disability Insurance Benefits Act ("Social Security Act"), 42 U.S.C. §§ 401-433 (1994 & Supp. II 1996).

54. FUTA, I.R.C. §§ 3301-3311 (1994 & Supp. II 1996), *as amended by* I.R.C. §§ 3301-3311 (West Supp. 1998).

55. If conventional group insurance is used, premiums are transmitted to an insurance company that assumes all claim risks, although a high claim rate can be expected to lead to future premium increases. Alternatively, the company may self-insure and pay claims out of its own resources. In such cases, an outside contractor may be used to process claims, and stop-loss or excess risk insurance may be purchased to limit the employer's liability risk. AMERICAN BAR ASSOC. SECTION OF LABOR AND EMPLOYMENT LAW, EMPLOYEE BENEFITS LAW 1050-52 (1991) [hereinafter EMPLOYEE BENEFITS LAW]. Health care costs have been described as the "culprit" behind increases in total compensation costs for employees. See Duff, *supra* note 7. Increasing reliance on employee contributions, however, may be causing some to forgo participation in

the benefit of group rates, thereby lowering per person premiums. In any event the cost to the employer is a deductible expense,⁵⁶ which lowers the effective cost of the insurance coverage provided. Employees may also be able to pay their portion of medical expenses with pre-tax income if their employer maintains a qualified flexible spending account plan.⁵⁷ However, individuals who work for themselves are less likely to secure favorable group health insurance rates, and the tax code does not grant them full tax deductibility for premium costs.⁵⁸

Pension benefits are a second area where Americans have looked to the workplace for coverage. Since the 1930s, the Social Security program has been one way that individuals have secured an income source to meet economic needs during retirement.⁵⁹ However, as the baby boom generation approaches retirement age, Americans have become increasingly concerned about the ability of the government to maintain the Social Security system's financial solvency. In fact, many younger workers anticipate that Social Security will not meet their needs when they retire.⁶⁰ For this reason, alternative sources of retirement income have become increasingly necessary.

Many American employers are addressing the retirement needs of their employees by providing defined benefit or defined contribution retirement plans. Under the former, employees secure benefits at retirement determined by their salaries and years of service, while the latter involves individually-managed retirement accounts; employers typically fund both in whole or in part.⁶¹ The major difference is that defined contribution plans do not entail a guaranteed retirement benefit, thereby placing upon the individual retiree the entire risk of

employer-provided health insurance programs. See McGinley, *supra* note 4.

56. Employee health insurance is deductible as an ordinary and necessary business expense under I.R.C. § 162(a) (1994 & Supp. II 1996), *amended by* I.R.C. § 162(a) (West Supp. 1998).

57. See generally RESEARCH INSTITUTE OF AMERICA, BENEFITS COORDINATOR §§ 33,901-33,926 (1998); Mark Edwards, *Reduce Payroll Taxes with a Cafeteria Plan*, 82 ILL. B.J. 161 (1994); David Langer, *How a Flexible Spending Account Plan Works*, THE PRACTICAL ACCOUNTANT, Mar. 1989, at 77-78.

58. Self-employed individuals had been permitted to deduct 45% of their health insurance costs for tax years 1998 and 1999, rising to 50% in 2000, and ultimately to 100% in 2007. I.R.C. § 162(l)(1) (1994 & Supp. II 1996), *amended by* I.R.C. § 162(a) (West Supp. 1998). The budget bill passed by Congress and signed by the President in October 1998 retains the 45% deductibility limit for 1998, but raises it to 60% in 1999 through 2001, 70% in 2002, and 100% in 2003. See *Tax Report: Self-Employed Workers May Deduct More of Their Health Insurance Costs*, WALL ST. J., Oct. 28, 1998, at A1. Employees of staffing firms, however, would not necessarily meet the definition of a self-employed individual with earnings from self-employment. Consequently, they would be less likely to qualify for any tax deduction for health insurance premiums. See *infra* note 310 and accompanying text.

59. Social Security Act, 42 U.S.C. §§ 401-433 (1994 & Supp. II 1996). See generally ROTHSTEIN & LIEBMAN, *supra* note 52, at 1241-78.

60. See *supra* note 3.

61. See EMPLOYEE BENEFITS LAW, *supra* note 55, at 24-25 (1991); Peter T. Scott, *A National Retirement Income Policy*, 44 TAX NOTES 913, 919-20 (1989).

successful or unsuccessful investment decisions.⁶² For those employees whose adjusted gross income does not exceed statutory limits, it is also possible to plan for retirement by diverting up to \$2000 of their yearly salary to Individual Retirement Accounts ("IRAs").⁶³ However, like defined contribution retirement plans, IRAs place responsibility for managing investment choices upon the retiree. Moreover, the role of IRAs is limited because of their restricted income eligibility criteria and the fact that they are entirely employee-funded.

While health insurance and pension benefits may be of special importance given their critical character, many other benefits are frequently tied to employment. Obviously this is true for paid time off from work for sick leave and vacations. Employers may also provide employees with life insurance at group rates, either entirely or partially paid for by the company.⁶⁴ In order to accommodate the family needs of its employees, companies may provide such benefits as day care and leaves of absence. Companies have also sought to make employees a part of the firm's ownership structure by providing options for stock purchases at discounted prices.⁶⁵ Even these, however, do not exhaust the variety of workplace benefits many employers now provide.

Although Americans associate the workplace with various benefits they have come to rely upon, that association has had only limited legal support. Even with respect to traditional full-time permanent employees, there are only a limited number of situations in which the law compels an employer to provide benefits to his work force. At the federal level, legislation mandates employee participation in the Social Security and Unemployment Insurance programs.⁶⁶ Otherwise, mandated benefits are the exception rather than the rule.⁶⁷ As a society we have generally chosen not to require by law that employers compensate their employees over and above the wages and salaries due for

62. The employer's potential liability for offering investment options which perform poorly or for failing to provide sufficient information about investment risks is unclear. *See In re Unisys*, 74 F.3d 420 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 56 (1996); ROTHSTEIN & LIEBMAN, *supra* note 52, at 1196-97.

63. Regular IRAs are characterized by the exclusion from income taxation of the initial contribution when made, followed by full income taxation of all distributions. I.R.C. § 408 (1994 & Supp. 1996), *amended by* I.R.C. § 408 (West Supp. 1998). In contrast, there is no income tax exclusion for contributions to a Roth IRA, but there is also no income taxation applicable to ultimate distributions, including all earnings on the original contributions. I.R.C. § 408(A) (West Supp. 1998).

64. The U.S. Chamber of Commerce reported that employers spend 0.4 cents-per-hour on employee life insurance and death benefits. 1997 Employee Benefits Report, *supra* note 52.

65. *See supra* notes 5-6.

66. *See supra* notes 53-54.

67. Hawaii's mandated employer-provided health insurance is a prominent exception. HAW. REV. STAT. § 21-393 (1985). Another example is the Maine statute requiring severance payments following a plant closing. ME. REV. STAT. ANN. tit. 26, § 625-B (West 1988). The statute was upheld by the Supreme Court against a challenge that it was preempted by ERISA and the National Labor Relations Act. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987).

services rendered.

Nevertheless, benefits have become a common feature of the employment landscape. To at least some extent, this development was encouraged by the wage and price control system put in place during World War II.⁶⁸ Applicable regulations at the time made it impossible to compete for workers by offering higher wages, but benefit increases were not deemed in violation of the wage and price control system.⁶⁹ Employers took advantage of this opportunity and in so doing stimulated the growth of benefit plans as part of the total compensation package employees have come to expect.⁷⁰ Pension benefit plans experienced significant growth in the period following World War II after the National Labor Relations Board ("NLRB"), with court approval, ruled that pension issues could not be excluded from collective bargaining negotiations.⁷¹ Further stimulation arose from the growing general belief in the advantages of pension programs as a means of securing a worker's allegiance to his or her employer.⁷²

However, at the same time that the public has grown to expect some benefit mixture as part of their compensation package, employers have discovered how increasingly expensive it is to provide such a package. The skyrocketing cost of health care is the primary driving force behind the cost increases,⁷³ but the pressure for an increasing array of benefits is also a factor.⁷⁴ Some employers

68. Emergency Price Control Act of 1942, 56 Stat. 23.

69. ALICIA HAYDOCK MUNNELL, *THE ECONOMICS OF PRIVATE PENSIONS* 7-12 (1982), reprinted in ROTHSTEIN & LIEBMAN, *supra* note 52, at 1169.

70. See Cantoni, *supra* note 7 (observing that the 1942 Stabilization Act "permitted the adoption of employer-paid insurance plans in lieu of wage increases").

71. *Inland Steel Co.*, 77 N.L.R.B. 1 (1948), *enforced*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949). See generally Note, *Pension and Retirement Matters—A Subject of Compulsory Collective Bargaining*, 43 ILL. L. REV. 713 (1948).

72. In a survey of 3381 employed men and women, 52% of the workers who were not offered health insurance benefits said they would change employers to obtain such benefits. See Richard L. Hannah, Ph.D., *The Tradeoff Between Worker Mobility and Employer Flexibility: Recent Evidence and Implications*, EMPLOYEE BENEFITS J., June 1994, at 23.

73. After a period of dramatic health care cost increases, followed by some moderation due to the growth of managed care and other cost control measures, health care costs may be on the increase again. See Hau, *supra* note 7. Drug prices may also be rising. See Elyse Tanouye, *Drugs: Behind the Inflation in Prescription-Drug Prices*, WALL ST. J., July 6, 1998, at A17. As much as 52% of employer's profits go to cover the cost of medical care. See Lee Sands, *Once Faddish Wellness Plans Now Standard at Large Firms*, DENV. BUS. J., June 28, 1991, at 25.

74. Probably the most significant area in which pressure exists to expand benefits concerns the extension of benefits to gay and lesbian partners of covered employees. This has been the subject of litigation and voluntary employer policy changes. See, e.g., *Rovira v. American Tel. & Tel.*, 817 F. Supp. 1062 (S.D.N.Y. 1993) (litigating the issue that company death benefits were denied to employee's same sex partner); Mark W. Davis, *Catholic Church Resists San Francisco's Gay Agenda*, WALL ST. J., Feb. 5, 1997, at A19 (discussing San Francisco's ordinance requiring employers doing business with the city to provide equivalent benefit treatment for non-heterosexual domestic partners of employees); *IBM Is Extending Health Benefit Plan to Partners of Gays*, WALL

have responded to this by increasing overtime wherever possible in lieu of hiring new workers because overtime compensation at time and one-half the employee's regular rate will often be less expensive than the cost of providing benefits to a new worker.⁷⁵ Others have discontinued benefits as a response to the problem, but taking such a step may serve to undercut the loyalty and commitment required of key personnel. Another way to deal with high benefit costs is to create a two-tier employment structure in which only a limited number of employees work in the traditional pattern of a continuous job with typical wage-connected benefits, while others are hired on a contingent basis without benefits. On the shop floor the two groups may be virtually indistinguishable, but the pay stubs they receive will be vastly different.

While some workers may be content with a second-tier employment environment, the reality of a job that does not offer health insurance and has no provision for retirement savings may be disastrous for others. To the extent such workers have looked to the law for relief, they have generally found that employers are free to divide the work force into haves and have-nots. Courts have left employers with the discretion to choose what kind of benefits to offer, if any, and to designate who the beneficiaries will be.⁷⁶ Existing legislation has not been viewed as an obstacle to virtually complete employer freedom of choice in making benefit eligibility decisions. However, this pattern has been called into question as a result of two important court rulings, one from the Ninth Circuit Court of Appeals involving the Microsoft Corporation,⁷⁷ and another from the U.S. Supreme Court addressing the statutory ban against interference with the securing of ERISA program benefits.⁷⁸ Each of these decisions identify troublesome contingent employee benefit problems that existing law may not adequately resolve.

ST. J., Sept. 20, 1996, at B5 (discussing the extension of health benefits to gay and lesbian partners of employees).

75. *See Factories Keep Lid on Hiring Despite Overtime Levels*, 155 Lab. Rel. Rep. (BNA) 269, 271 (June 30, 1997); *Autos: UAW Strike at Michigan Truck Plant Over Staffing Levels Idles 5,900 Workers*, 1997 Daily Lab. Rep. (BNA) No. 80, at A3 (Apr. 25, 1997).

76. "ERISA does not mandate that employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 91 (1983). Relying on this principle, the court in *McGann v. H & H Music Co.*, 946 F.2d 401 (5th Cir. 1991), *cert. denied*, 506 U.S. 981 (1992), permitted the employer to alter the company's \$1 million lifetime medical coverage to incorporate a \$5000 limit for AIDS-related claims. However, benefit plan changes must be made pursuant to a procedure contained in the plan which includes the identification of those with the authority to make the changes. *See Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995).

77. *Microsoft Corp. I*, 97 F.3d 1187 (9th Cir. 1996), *aff'd on reh'g*, *Microsoft Corp. II*, 120 F.3d 1006 (9th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 899 (1998).

78. *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Ry. Co.*, 117 S. Ct. 1513 (1997).

II. JUDICIAL RESPONSES TO CONTINGENT EMPLOYEE BENEFIT CLAIMS

A. *The Microsoft and Inter-Modal Rail Employees Ass'n Cases*

The dispute in the *Microsoft*⁷⁹ cases grew out of Microsoft's utilization of a two-tier employment structure. Microsoft maintained a core of permanent employees who received such benefits as paid vacation, sick leave, holidays, short-term disability, group health and life insurance, stock options and pensions. It supplemented its core work force with a separate group of contract workers whom it labeled "freelancers." In contrast to the company's regular employees, Microsoft's freelancers did not receive any company-provided benefits.⁸⁰

Microsoft attempted to maintain a distinction between its core employee staff and the freelance work force, even though freelancer work functions were fully integrated with those of the company's regular workers.⁸¹ For example, the freelancers wore different color badges, had different electronic mail addresses, were given a less formal orientation and were not invited to official company functions. Moreover, after submitting invoices for services, they were paid through the accounts receivable department without any deductions for withholding and employment taxes, as compared to Microsoft's traditional employees who received their paychecks from the payroll department after all such deductions had been made.⁸² Finally, when hired, the freelancers were specifically informed that they were not employees and would receive no benefits. They were required to sign an agreement which included the statement that "as an Independent Contractor to Microsoft, you are self employed and are responsible to pay all your own insurance and benefits."⁸³

Microsoft's work force structure first ran into difficulty when it was audited by the Internal Revenue Service ("IRS"). Using common law standards, the IRS concluded that the freelancers were employees for purposes of withholding and employment taxes.⁸⁴ Microsoft paid the required taxes and issued retroactive W-2 forms to the freelancers,⁸⁵ but then restructured the relationship in an attempt to avoid comparable problems in the future. It did this by requiring the freelancers to enter into a relationship with a temporary employment agency which would administer federal income tax withholding and pay all employment

79. *Microsoft Corp. I*, 97 F.3d 1187 (9th Cir. 1996). The basic analysis of the panel opinion was affirmed in the en banc Ninth Circuit ruling, although the case was remanded to the benefits plan administrator for consideration of the Microsoft theory which had not previously been presented at that level. *Microsoft Corp. II*, 120 F.3d 1106, 1015 (9th Cir. 1997) (en banc).

80. *Microsoft Corp. I*, 97 F.3d at 1189-90.

81. *See id.* at 1190.

82. *See id.* The freelancers would document their hours and the projects on which they worked in the invoices they submitted. They were paid in much the same manner that a contractor providing supplies to Microsoft would have been paid. *See id.*

83. *Id.*

84. *See id.*

85. *See id.* at 1190-91.

taxes.⁸⁶

A number of former freelancers then sought various company benefits, which Microsoft's benefits plan administrator denied.⁸⁷ The plaintiffs did not pursue their claims for such benefits as vacation, sick leave, holidays, and short-term disability, but they did pursue claims challenging the denial of two specific benefits, the Microsoft deferred salary plan to which the company contributed 50% up to a maximum and the employee stock purchase plan that allowed employees to purchase company stock at a reduced price, up to a specified limit.⁸⁸

The parties agreed that the deferred compensation plan was a welfare benefit plan covered by ERISA, and that the plaintiffs' eligibility to participate was governed by federal law.⁸⁹ The plan's eligibility rules provided that each "employee" over eighteen years of age with more than six months of service could participate, and went on to define the word employee as meaning "any common law employee who receives remuneration for personal services rendered to the employer and who was on the United States payroll of the employer."⁹⁰ The Company did not dispute the plaintiffs' satisfaction of all but one of the eligibility criteria, including the fact that the plaintiffs were common law employees. The only contested issue was the question of whether the freelancers were on Microsoft's U.S. payroll. The plaintiffs maintained that the relevant language extended coverage to all employees paid from U.S. sources, while Microsoft insisted that only those paid through the payroll department were covered.⁹¹

Both ERISA legal principles and the unique procedural character of the litigation contributed to Microsoft's ultimate loss before a panel of the Ninth Circuit Court of Appeals. Under ERISA, decisions of a plan administrator or fiduciary are subject to review under an abuse of discretion standard where the plan administrator or fiduciary is given discretionary authority to determine eligibility. If the plan is not structured in such a fashion, plan administrator decisions are reviewed *de novo*.⁹² Unfortunately for Microsoft, the panel concluded that the abuse of discretion standard applicable to benefit plans that vest discretion in the plan administrator would not be applied regardless of the structure of Microsoft's benefit plan system because the question at issue, namely the meaning of the plan eligibility phrase, "on the United States payroll of the employer," had not been presented to the plan administrator.⁹³ At that stage of the proceedings the company had relied upon the independent contractor

86. *See id.*

87. *See id.* at 1191.

88. *See id.*

89. *See id.* at 1192.

90. *Id.*

91. *See id.* at 1192-93.

92. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 102 (1989); EMPLOYEE BENEFITS LAW, *supra* note 55, at 509-13.

93. *Microsoft Corp. I*, 97 F.3d at 1193.

agreements to justify its decision to deny the plaintiffs' demand to participate in the plan. Moreover, once the dispute reached federal court, both parties agreed that a remand to the plan administrator would not be necessary.⁹⁴ Accordingly, the Ninth Circuit panel concluded that it should exercise its review authority on the assumption that the plan administrator had no discretion to review the plan. This meant that the court was free to consider the issue *de novo*.⁹⁵

Using general principles of contract interpretation, the Ninth Circuit panel observed that both the plaintiffs' and Microsoft's reading of the deferred compensation plan eligibility standards were reasonable.⁹⁶ It then concluded that since there was no extrinsic evidence favoring one interpretation over the other, the eligibility criteria should be interpreted against the drafter, leading to the result that freelancers were deemed eligible for participation in the plan.⁹⁷ However, the court emphasized that this result was not dictated by the provisions of ERISA, but rather was due to the ambiguous language contained in the Microsoft plan document.⁹⁸ It explicitly noted its agreement with the magistrate judge who had earlier concluded that the company "could easily have accomplished the limitation it now urges through the use of more explicit language."⁹⁹ In other words, Microsoft was not barred by law from excluding its freelancers from eligibility in the deferred compensation plan, but had simply failed to draft satisfactory language to accomplish that objective.¹⁰⁰

In contrast to the deferred compensation plan, the parties agreed that the stock purchase plan was not subject to ERISA, but rather was governed by state law.¹⁰¹ The starting point, once again, was the language used in the relevant plan document. The section of the plan at issue provided:

It is the intention of the Company to have the Plan qualify as an 'employee stock purchase plan' under Section 423 of the Internal Revenue Code of 1954. The provisions of the Plan shall, accordingly, be construed so as to extend and limit participation in a manner

94. *Id.*

95. *Id.*

96. *Id.* at 1194.

97. *Id.* at 1196. For an illustration of the impact of using the deferential abuse of discretion standard in reviewing plan administrator eligibility determinations, see *Trombetta v. Cragin Federal Bank for Savings Employee Stock Ownership Plan*, 102 F.3d 1435 (7th Cir. 1996).

98. *Microsoft Corp. I*, 97 F.3d at 1196.

99. *Id.*

100. After the *Microsoft* ruling, one commentator observed:

Nothing in the [*Microsoft*] decision requires customers to provide benefits to staffing firm employees. Even if staffing firm employees assigned to a customer could be considered in a particular case to be the customer's employees, the customer can deny coverage if its plan excludes them in clear and explicit language.

LENZ, *supra* note 33, at 28.

101. See *Microsoft Corp. I*, 97 F.3d at 1196.

consistent with the requirements of that Section of the Code.¹⁰²

And as the court recognized, § 423 requires that “options are to be granted to all employees of any corporation whose employees are granted any of such options by reason of their employment by such corporation.”¹⁰³ This led the court to conclude that the plaintiffs were entitled to participate in the plan.¹⁰⁴ The court reasoned that the plaintiffs were common law employees, § 423 of the Internal Revenue Code required that all common law employees be granted stock options under the type of plan at issue, and the plan itself had the objective of being in compliance with § 423 of the Code.¹⁰⁵

Although Microsoft argued that the provisions of the Internal Revenue Code did not grant the plaintiffs a private right of enforcement,¹⁰⁶ the court concluded that this argument was largely irrelevant. The plaintiffs were seeking participation in the benefit plan based upon the plan document’s language which the drafters had written to incorporate the standards of the Internal Revenue Code.¹⁰⁷ In short, the plaintiffs were seeking to enforce the provisions of the plan, not those of the Internal Revenue Code. Even the fact that the plaintiffs signed documents that excluded them from coverage was not controlling since those documents were in conflict with the language of the plan which expressly incorporated § 423 of the Code.¹⁰⁸

The dispute between Microsoft and its freelancers, however, did not end with the panel ruling. Instead, the case was heard by the Ninth Circuit Court of Appeals sitting en banc.¹⁰⁹ Initially, the en banc opinion concluded that the Microsoft freelancers were common law employees, a point that the company

102. *Id.* at 1197.

103. I.R.C. § 423(b)(4) (1994).

104. *Microsoft Corp. I*, 97 F.3d at 1197.

105. *Id.*

106. There is no specific provision in the Internal Revenue Code allowing individuals to pursue litigation to collect federal taxes which might be owed. However, the issue of a private right to enforce federal law arose in the context of the Federal Elections Campaign Act Amendments of 1974. In *Cort v. Ash*, 422 U.S. 66 (1975), the Supreme Court ruled that no private right of action was created by Congress to enforce the statute. The Court’s ruling was based upon consideration of whether: (1) the plaintiff is one of the class for whose special benefit the statute was enacted; (2) there is any indication of legislative intent either to create or deny a private remedy; (3) a private remedy would be consistent with the underlying purposes of the legislative scheme; and (4) the cause of action is one traditionally relegated to state law so that it would be inappropriate to infer a cause of action based solely on federal law. *Id.* at 78. Relying upon this analysis, it has been held that ERISA does not create a private remedy to challenge an employer’s creation of a ‘top-heavy’ retirement plan which would violate Internal Revenue Code standards for securing favorable tax treatment. See *Trenton v. Scott Paper Co.*, 832 F.2d 806, 809 (3d Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988).

107. See *Microsoft Corp. I*, 97 F.3d at 1197.

108. *Id.* at 1198-99.

109. *Microsoft Corp. II*, 120 F.3d 1006 (9th Cir. 1997) (en banc).

itself had not contested,¹¹⁰ and that the misclassification of the freelancers as independent contractors was a mistake rather than an intentional violation of governing legal principles.¹¹¹ The court then reasoned that the status of the freelancers as potential deferred compensation program participants had to be determined by the coverage provided in the plan documents because it could not be governed by the erroneous independent contractor classification decision, even though the freelancers had signed independent contractor agreements acknowledging that they were ineligible to participate in any company benefit plan.¹¹² The court's ruling on these issues paralleled the decision of the Ninth Circuit panel.

The freelancers' claim for deferred compensation had already been considered by the benefits plan administrator for Microsoft, and had been ruled invalid.¹¹³ However, that ruling was based upon the erroneous classification of the freelancers as independent contractors.¹¹⁴ The en banc court concluded that this was reversible even under the flexible arbitrary or capricious standard of review.¹¹⁵ Once the dispute reached the courts, however, Microsoft substituted its new legal theory that benefit eligibility was properly denied because the freelancers were paid by the accounts receivable department rather than payroll.¹¹⁶ But rather than reject this argument as the Ninth Circuit panel had done, the court sitting en banc determined that the company's new theory should be referred back to the benefits plan administrator for a decision.¹¹⁷ Although the court did not explicitly address the issue, presumably this would mean that the plan administrator's ruling would only be reversible for abuse of discretion rather than subject to the de novo review standard applied by the Ninth Circuit panel.¹¹⁸ Although the court cautioned the benefits plan administrator to "pay careful attention" to the decision of the Ninth Circuit panel, the en banc court nevertheless concluded that it was the plan administrator who had the "primary duty of construction."¹¹⁹

In contrast to its decision to remand the claim for participation in the deferred compensation plan, the Ninth Circuit en banc ruling affirmed the panel's conclusion that the freelancers were entitled to participate in the Microsoft stock

110. *Id.* at 1010.

111. *Id.* at 1011.

112. *Id.* at 1012-13.

113. *See id.* at 1013.

114. *See id.*

115. *Id.*

116. *See id.*

117. *Id.* at 1013-14.

118. At the beginning of its decision the en banc court took pains to restate the abuse of discretion review standard applicable to discretionary decisions of plan administrators. *Id.* at 1009.

119. *Id.* at 1013. In contrast, Judge Fletcher, writing for seven members of the en banc panel, argued that a remand to the benefits plan administrator was inappropriate on the grounds that a plan should "not be permitted to assert on judicial review reasons for denial that were not contained in the plan administrator's decision." *Id.* at 1016.

purchase plan. It viewed the company as having extended the plan to its employees in return for services rendered and as a means to insure a productive work force.¹²⁰ In the court's view, the fact that Microsoft's officers mistakenly concluded that the freelancers were not covered employees did not change the fact that the Microsoft offer was accepted by the workers through their labor.¹²¹ All that was left, according to the court, was for the district court to determine an appropriate remedy.¹²²

Even if the plaintiffs in the *Microsoft* case are successful in securing benefits from the deferred compensation plan as well as the stock purchase program, the message of the decision is merely that benefit plan language must be carefully written if the employer seeks to exclude contingent employees. Neither decision indicates that an employer decision to exclude contingent employees from benefit plan eligibility is prohibited by law. This raises the distinct possibility that employers will conclude that they can achieve significant cost reductions through the elimination of workplace benefits by converting their workers into contingent employees.¹²³ However, the extent to which the law permits the outright replacement of permanent workers by alternative service providers is somewhat uncertain.

Aspects of this problem were addressed by the Supreme Court in *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Railway Co.*¹²⁴ As part of a cost reduction program, the company had decided to subcontract the work of transferring cargo between railcars and trucks.¹²⁵ Many of its employees, who previously had performed the work directly, were then hired by the subcontractor.¹²⁶ Under this new contractual arrangement, the subcontractor was not required to make contributions under the Railroad Retirement Act, and it provided a total benefit package that was inferior to what the employees previously received.¹²⁷ As a result of the reduction in their benefits, the employees filed suit alleging that their original employer had discharged them "for the purpose of interfering with the attainment of any right to which such participant may become entitled under" the original welfare and benefit plans in violation of section 510 of ERISA.¹²⁸

The Ninth Circuit Court of Appeals had held that the plaintiffs stated a valid claim with respect to pension benefits because section 510 of ERISA "protects plan participants from termination motivated by an employer's desire to prevent

120. *Id.* at 1014.

121. *Id.* at 1014-15.

122. *Id.* at 1015.

123. *See supra* note 10.

124. 117 S. Ct. 1513 (1997).

125. *See id.* at 1514.

126. *See id.*

127. *See id.* at 1514-15.

128. *Id.* at 1515.

129. 29 U.S.C. § 1140 (1994).

a pension from vesting.”¹³⁰ This ruling was not disturbed by the Supreme Court. In addition, the Ninth Circuit had concluded that no valid claim was stated under section 510 with respect to welfare benefit rights because such rights are not subject to the vesting requirements of federal law.¹³¹ The Supreme Court, in contrast, found this aspect of the Ninth Circuit decision erroneous.¹³²

The Ninth Circuit ruling was based upon the fact that ERISA, which establishes a system for the vesting of pension benefits, does not provide comparable treatment for welfare benefits.¹³³ Consequently, employers have the right to unilaterally terminate welfare benefits and employees have no rights under such plans to question an employer’s alleged interference with them.¹³⁴ However, the Supreme Court concluded that the plain language of section 510 indicated that there is no distinction between welfare and pension benefits for purposes of the statute’s ban against interference with the attainment of ERISA rights.¹³⁵ Welfare plans are included with pension plans in the statute’s definition of covered plans, and if Congress had wanted to distinguish between the two for purposes of section 510 it could have used the term pension plan or non-forfeitable plan in describing the extent of the section’s coverage.¹³⁶

The Court recognized that welfare benefit plans are not subject to vesting requirements, and may be amended or terminated without violating ERISA’s standards.¹³⁷ However, this requires that the plan contain procedures to be followed in cases of plan amendment or termination.¹³⁸ Employers must adhere to these procedures to alter or terminate their benefit plans, and cannot circumvent this obligation by defeating employee expectations in other ways.

130. *Inter-Modal Rail Employees Ass’n v. Atchison, Topeka & Santa Fe Ry. Co.*, 80 F.3d 348, 350-51 (1996) (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 143 (1990)).

131. *See Inter-Modal Rail Employees Ass’n*, 117 S. Ct. at 1515.

132. *Id.* at 1516.

133. ERISA establishes minimum vesting standards for pension plans. The basic requirement is that pension rights become non-forfeitable in their entirety after five years of service (cliff vesting) or on a percentage basis over a five-year period (20% after three years of service, rising to 100% after seven years of service). Multi-employer plans pursuant to collective bargaining agreements are permitted to use ten-year vesting periods. *See* 29 U.S.C. § 1053 (1994 & Supp. II 1996). In contrast, welfare benefit plans do not vest. One set of commentators explains that this is based upon the fact that welfare benefit programs are generally ‘current account’ or ‘pay as you go,’ with participants either using or declining the benefits. They are “too short-term in character to have attracted much in the way of long-term service conditions” and therefore “vesting protections have not been thought necessary.” JOHN H. LANGBEIN & BRUCE A WOLK, *PENSION AND EMPLOYEE BENEFIT LAW* 508 (2d ed. 1995).

134. *See Inter-Modal Rail Employees Ass’n*, 80 F.3d at 351.

135. *Inter-Modal Rail Employees Ass’n*, 117 S. Ct. at 1515.

136. *See id.*

137. *Id.* at 1516.

138. *See* 29 U.S.C. § 1102(b)(3) (1994); *see also* *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 84-85 (1995) (holding that general language reserving the company’s right to terminate or amend a plan is sufficient to satisfy ERISA).

Arguably, this would occur if an employer indirectly amended the plan by terminating its work force while having them continue to perform the same functions as employees of a subcontractor who did not provide equivalent benefits. This could constitute the effective discharge of employees for the purpose of interfering with their attainment of plan rights that section 510 prohibits.¹³⁹ However, the Court specifically declined to rule on the company position that section 510 is not violated in cases where an employee is already eligible to receive benefits on the theory that benefit 'attainment' already exists; the case was remanded to allow the Ninth Circuit to consider this argument.¹⁴⁰ As a result, *Inter-Modal* only decided that ERISA's anti-interference provision applied to all covered benefits, leaving the question of what constitutes prohibited interference unresolved.

B. Alternative Judicial Approaches to Mandatory Benefits

The outcome of the Supreme Court's *Inter-Modal* decision and the Ninth Circuit Court of Appeals rulings in *Microsoft* was the rejection of the employers' positions that there could be no obligation to provide benefits to the contingent employee plaintiffs. Conversely, the decisions suggested the possibility that employers may have a legal duty, in some circumstances, to provide contingent employees with the same benefits made available to members of the permanent work force. Yet, the traditional view held that an employer is not required to provide benefits beyond those which are mandated by law. One commentator states definitively that no benefit obligations arise with respect to contingent employees.¹⁴¹ However, while it is true that benefit claims by contingent employees have usually been unsuccessful, there are some exceptions. Moreover, even where there is no obligation to provide benefits, other consequences may make this outcome problematic.

The principle that employers are not obligated to provide benefits to contingent employees is illustrated by the ruling of the Fourth Circuit Court of Appeals in *Clark v. E. I. DuPont de Nemours & Co.*¹⁴² There the claimant, who had been a DuPont employee for eight years, was terminated following the closing of his division.¹⁴³ Subsequently, he performed occasional contract work for DuPont, and later was hired by a leasing firm which assigned him to work on

139. A critical issue in this analysis is the requirement that the company action be taken for the purpose of interfering with the attainment of rights protected by ERISA. The Court recognized that this prohibited purpose might not be present if the employer acts in the course of "making fundamental business decisions," but its opinion shed no light on the meaning of this distinction. *Inter-Modal Rail Employees Ass'n*, 117 S. Ct. at 1516.

140. *Id.* at 1516-17.

141. LENZ, *supra* note 33, at 21.

142. 105 F.3d 646, No. 95-2825, 1997 WL 6958 (4th Cir. Jan. 9, 1997) (unpublished disposition), *cert. denied*, 117 S. Ct. 2425 (1997).

143. *See id.* at *1.

a DuPont contract.¹⁴⁴ He participated in the leasing company's benefit programs, but none of them were directly funded by DuPont.¹⁴⁵ When the leasing company lost its DuPont contract, the claimant sought benefits under the DuPont plan.¹⁴⁶

The court was prepared to assume that the claimant met the standards for classification as a common law DuPont employee. Nevertheless, it upheld the decision to deny him the right to participate in the benefit program, relying principally upon the benefit plan document provisions which limited participation to "any person designated by the Company as a full-time employee. Any full service employee on the role [as of December 1, 1985] who continues to work at least [twenty] hours per week on a regular basis will be considered a Full Service Employee."¹⁴⁷ With respect to the company's stock ownership program, as well as its the savings and investment plan, the court recognized that all employees, including leased workers, had to be counted for purposes of determining participation rates in order to qualify for favorable tax treatment.¹⁴⁸ Nevertheless, all relevant plan documents expressly excluded leased employees from benefit program eligibility, and the court found this fact controlling. The court concluded that the plaintiff's claim was properly denied because the plaintiff was a leased employee expressly excluded from plan participation, with neither the provisions of ERISA nor those of the Internal Revenue Code requiring a contrary result.¹⁴⁹

In *Abraham v. Exxon Corp.*,¹⁵⁰ the Fifth Circuit Court of Appeals faced a similar claim for benefit plan participation by a leased employee who was expressly excluded by the relevant plan documents. In support of his claim, the plaintiff cited the minimum participation and coverage requirements for plans established by both ERISA and Treasury Department regulations.¹⁵¹ The court

144. *See id.*

145. *See id.*

146. *See id.*

147. *Id.* at *3.

148. *Id.* The prohibition against tax favored status for 'top heavy' plans which unduly favor highly compensated personnel cannot be circumvented through the use of leased workers. Leased workers must be counted in determining whether the company's plan is top heavy. *See* I.R.C. § 414(n) (1994 & Supp. II 1996), *amended by* I.R.C. § 414 (West Supp. 1998); *see also infra* notes 269-78 and accompanying text.

149. *Clark*, 1997 WL 6958, at *3 n.2. The court observed that the term 'employee' must include leased workers "solely for tax purposes." Additionally, the court rejected the idea that ERISA requires that any particular employee be included in the benefit plan as long as the exclusion is not based on prohibited age or length of service considerations. *Id.* at *4. Benefit plan participation must therefore be determined on the basis of the relevant plan documents, and *Clark* was simply "not eligible to receive benefits under the plain language of the Plans." *Id.* at *5.

150. 85 F.3d 1126 (5th Cir. 1996).

151. *See id.* at 1130-31. The plaintiff relied upon 29 U.S.C. § 1052(a)(1)(A) (1994) and 26 C.F.R. § 1.410(b)-(4)(c)(3) (1998) as the basis for the argument that pension plans may not discriminate against leased workers who otherwise fit the definition of a common law employee under applicable legal criteria. *See id.* at 1130.

rejected this position concluding that the relevant provisions of ERISA did not bar discrimination against leased employees.¹⁵² Moreover, it held that the Treasury Department regulations relied upon by the plaintiff only served to determine the eligibility of the plan for favorable tax treatment.¹⁵³ In short, neither ERISA nor relevant tax law provisions created an enforceable right to plan participation for leased employees.

More recent district court decisions in Kansas and Iowa, as well as a ruling by the Seventh Circuit Court of Appeals, have added further weight to the position that contingent employees have no inherent right to claim benefits from their employer. The Kansas case, *Capital Cities/ABC, Inc. v. Ratcliff*,¹⁵⁴ involved a claim for ERISA benefits made by newspaper carriers for *The Kansas City Star* and *Kansas City Times* newspapers. The carriers had signed agreements stating that they were self-employed independent contractors and acknowledged that they would "not receive, and [have] no claim to, any benefits or other compensations currently paid" to the company's employees.¹⁵⁵ For the court, the carriers' acknowledgment that they were ineligible for the company's benefit plan was sufficient to justify denial of their claim even if they met the standard for classification as common law employees. In effect, they had contracted away any right they might otherwise have had to participate in the company's benefit plan.¹⁵⁶ In addition, the rejection was supported by the fact that the carriers were not eligible employees under the relevant plan documents.¹⁵⁷

In *Coonley v. Fortis Benefit & Insurance Co.*,¹⁵⁸ an Iowa federal district court ruling produced the same result for an independent contractor who sought

152. *Abraham*, 85 F.3d at 1130-31.

153. *Id.* at 1131.

154. 953 F. Supp. 1228 (D. Kan. 1997), *aff'd*, 141 F.3d 1405 (10th Cir. 1998).

155. *Id.* at 1231.

156. *See id.* 1234-35. In contrast, both the Ninth Circuit Court of Appeals panel and the en banc panel in the *Microsoft* cases did not consider controlling the fact that the freelancers for Microsoft had signed agreements acknowledging that, as independent contractors, they were ineligible for benefits because they were in fact common law employees. *Microsoft Corp. I*, 97 F.3d 1187, 1194-95 (9th Cir. 1996), *aff'd on reh'g*, *Microsoft Corp. II*, 120 F.3d 1006, 1010-12 (9th Cir. 1997) (en banc).

157. There were four ERISA benefit plans and each contained eligibility criteria which did not apply to the carriers. *Capital Cities/ABC, Inc.*, 953 F. Supp. at 1235-36. *Microsoft* was distinguished on the grounds that the relevant eligibility criteria in Microsoft's plan allowed participation for common law employees, a status met by the freelancers despite the contract they signed labeling themselves independent contractors. *Id.* at 1236. Subsequently, the Tenth Circuit Court of Appeals affirmed the district court conclusions that the claimants were properly denied benefits because they signed documents acknowledging their ineligibility and they did not meet the eligibility criteria of the relevant plans. *Capital Cities/ABC, Inc. v. Ratcliff*, 141 F.3d 1405, 1412 (10th Cir. 1998).

158. 956 F. Supp. 841 (N.D. Iowa 1997), *aff'd*, 128 F.3d 675 (8th Cir. 1997) (per curiam).

benefits under an employee life insurance policy.¹⁵⁹ Finally, in *Trombetta v. Cragin Federal Bank for Savings Employee Stock Ownership Plan*,¹⁶⁰ the Seventh Circuit Court of Appeals upheld the denial of benefits to bank loan originators who had signed documents agreeing that they were to be considered “independent contractors and not employee . . . for all purposes,”¹⁶¹ in light of the fact that benefit plan participation was limited to “employees.”¹⁶²

The *Microsoft* decision and rulings that support employers in their denial of workplace benefits to contingent employees, focus upon contract principles in determining benefit eligibility. The “contract” is the employer benefit plan along with any documents the contingent employee may have signed as a condition of employment. The benefit plan document will in some fashion define those who are eligible for participation, often simply by identifying the members of the labor force who may participate in the benefit program at issue. Coverage is then judged by evaluating the claimant’s eligibility pursuant to the plan definition, or by an assessment of whether he has waived the right to participate.¹⁶³

Of course, the more specific the plan document, the less likely it is that coverage problems will arise in the future. For example, the document might specify that covered individuals include all common law employees working a specified number of hours per week for a specified number of weeks per year. However, even a description in this form may ultimately prove inadequate as

159. Critical to the *Coonley* court’s conclusion that benefits were properly denied was its judgment that the claimant did not meet the standards for classification as an employee, and only employees were entitled to benefit program participation. *Id.* at 858-60. In the court’s words, since the claimant “was not an employee of [the corporation] within the meaning of the Plan, [and b]ecause ‘employee’ status is required for coverage under the Plan . . .,” summary judgment for the employer was appropriate. *Id.* at 860. The district court decision was affirmed in a per curiam ruling by the Eighth Circuit Court of Appeals. *Coonley v. Fortis Benefit & Ins. Co.*, 128 F.3d 675 (8th Cir. 1997) (per curiam).

160. 102 F.3d 1435 (7th Cir. 1996).

161. *Id.* at 1440. In addition benefits were deemed to have been properly denied since they were available only for employees, and the finding that the claimants did not fit this category was not arbitrary or capricious.

162. *Id.* at 1437. The plan administrators were aided by the fact that the plan documents conferred discretion upon them to interpret eligibility criteria, and this meant that their decision was reviewable under an arbitrary and capricious standard rather than de novo. *See id.* at 1438.

163. *E.g.*, *Capital Cities/ABC, Inc. v. Ratcliff*, 141 F.3d 1405, 1412 (10th Cir. 1998) (emphasizing “the fact that the Carriers had signed the Agreements, which specifically provided that they would receive no benefits”); *Clark v. E.I. DuPont de Nemours & Co.*, No. 95-2825, 1997 WL 6958, at *2 (4th Cir. Jan. 9, 1997) (noting that plan participants are those who “according to the language of the plan itself, [are] eligible to receive a benefit under the plan”); *Trombetta*, 102 F.3d at 1437, 1440 (noting that benefit plan participation was limited to employees and the bank loan originators had executed independent contractor agreements which acknowledged that they were not employees); *Abraham v. Exxon Corp.*, 85 F.3d 1126, 1131 (5th Cir. 1996) (upholding administrator’s construction of the plan to exclude leased employees).

illustrated by the rulings in *Microsoft*.¹⁶⁴ Even though the company had limited benefit eligibility to common law employees, that classification incorporated the freelance contract workers Microsoft did not want to include. Microsoft was then forced to rely on its interpretation of the plan language that tied benefit eligibility to workers who were on the company's U.S. payroll. Unfortunately for Microsoft, the Ninth Circuit panel found the plaintiffs' view that eligibility included payment through accounts receivable as well as through Microsoft's payroll department, a permissible construction of Microsoft's plan eligibility requirements.¹⁶⁵ However, the en banc decision held that the benefits plan administrator must initially determine the actual plan construction.¹⁶⁶

To avoid this type of problem, particularly with respect to contingent employees, the benefit plans in *Clark* and *Abraham* incorporated specific eligibility exclusions. The plan documents stated explicitly that leased employees were not covered. Since the plaintiffs in both cases were clearly within that category, they could not rely upon contract principles to support their claims. The very same result was applied to the plaintiffs in *Coonley* and *Capital Cities/ABC, Inc.* In *Coonley*, the court made an explicit finding that the insurance policy claimant was not an employee under common law standards, and therefore was not eligible for life insurance benefits.¹⁶⁷ The *Capital Cities/ABC, Inc.* court reached the same result, but emphasized the newspaper carriers' agreement not to be eligible for benefits along with the eligibility criteria contained in the governing plan documents.¹⁶⁸ Finally, the *Trombetta* court found support for the denial of benefits to the plaintiffs in the factual conclusion that the claimants were not common law employees, as well as their admission of independent contractor status on the employment contracts they signed.¹⁶⁹

To successfully resist contingent employee benefit claims on contract-based principles, it is necessary for the governing plan document to be as clear and precise as possible in defining eligible participants as well as those who are excluded. It is true that as a result of the complexity of Microsoft's employment structure, the Ninth Circuit panel was able to find that Microsoft intended to

164. See notes 79-123 and accompanying text.

165. *Microsoft Corp. I*, 97 F.3d 1187, 1196 (9th Cir. 1996).

166. *Microsoft Corp. II*, 120 F.3d 1006, 1014 (9th Cir. 1997) (en banc). In contrast, the panel ruling as well as seven members of the en banc court concluded that the determination could be made by the court directly because Microsoft's argument had not been presented to the plan administrator when the freelancers' claim was first heard. Compare *Microsoft Corp. II*, 120 F.3d 1006 (9th Cir. 1997) (en banc), with *id.* at 1015 (Fletcher, J., concurring in part, dissenting in part) and *Microsoft Corp. I*, 97 F.3d 1187 (9th Cir. 1996). Had the plan document explicitly stated that only workers who received their compensation from the payroll department were eligible for benefits, the analysis of both the panel and en banc opinions likely would have resulted in a Microsoft victory.

167. 956 F. Supp. 841, 858-60 (N.D. Iowa), *aff'd*, 128 F.3d 675 (8th Cir. 1997) (per curiam).

168. *Capital Cities/ABC, Inc. v. Ratcliff*, 141 F.3d 1405, 1412 (10th Cir. 1998).

169. *Trombetta v. Cragin Fed. Bank for Sav. Employee Stock Ownership Plan*, 102 F.3d 1435, 1439-40 (7th Cir. 1996).

include all common law employees paid from U.S. sources. This intent overrode an apparently conflicting intent reflected in the documents signed by the employees upon hiring.¹⁷⁰ But as the Ninth Circuit panel recognized, more careful drafting could have achieved the very result Microsoft intended.¹⁷¹ More specifically, if Microsoft had chosen to employ a leased work force and had amended the plan document to exclude leased workers, it could very well have been as successful as DuPont and Exxon in resisting benefit claims by contingent employees.¹⁷²

Nevertheless, the *Microsoft* ruling also illustrates that, in some circumstances, achieving the desired result of excluding contingent employees may produce other difficulties. In the portion of the opinion dealing with the Microsoft stock option plan, the court noted that the plan itself included an objective of obtaining tax qualified status which, in turn, obligated the company to include all employees.¹⁷³ Redrafting the plan document could enable Microsoft to exclude the freelancers from the stock option plan. However, this might not be an entirely satisfactory result. If Microsoft was successful in excluding the workers in question, it might find itself in more trouble due to the risk of losing the tax qualified status of its plan. This, in turn, could mean the loss of tax deductibility for company contributions and earnings, coupled with the immediate taxability of benefits to the employees upon their receipt of stock options.¹⁷⁴ It is likely that such benefits would not be offered without a tax

170. The panel observed that there was no evidence to suggest that the company had ever denied benefits to anyone whom it understood to be a common law employee. *Microsoft Corp. I*, 97 F.3d at 1195. The en banc opinion emphasized this point, viewing the independent contractor agreements as a reflection of the freelancer's mistaken belief that they were not common law employees. As a result, the agreements were recast by the court as mere warnings concerning the benefit implications if the freelancers were independent contractors. *Microsoft Corp. II*, 120 F.3d at 1011-12.

171. *Microsoft Corp. I*, 97 F.3d at 1196. The en banc opinion did not address this question because it remanded the issue of the claimants' benefit eligibility back to the plan administrator, but nothing in the opinion suggests any disagreement with the panel position on this point.

172. In fact, Microsoft took steps to avoid future benefit eligibility problems. As explained in the panel ruling, the company converted its freelancers by giving them "the option of terminating their employment relationship with Microsoft completely or continuing to work at the company but in the capacity of employees of a new temporary employment agency, which would provide payroll services, withhold federal taxes, and pay the employer's portion of FICA taxes." *Id.* at 1191. On remand, the district court held that the plaintiff group included all the converted workers who met the standard for classification as a Microsoft common law employee. *Vizcaino v. Microsoft Corp.*, 1998 Daily Lab. Rep. (BNA) No. 138, at E11 (July 20, 1998). Even if these individuals are successful in the litigation, however, the precedent would not apply to other benefit plans which specifically exclude leased workers.

173. *Microsoft Corp. I*, 97 F.3d at 1197; *Microsoft Corp. II*, 120 F.3d at 1014-15.

174. Depending upon the type of benefit plan at issue, tax advantages can include tax deferral on the benefit until received by the beneficiary (a major consideration in deferred salary plans), I.R.C. § 402 (1994 & Supp. II 1996), amended by I.R.C. § 402 (West Supp. 1998);

preference. The tax code requires that particular individuals must be included in a benefit plan in order to receive favorable tax treatment as a way of pressuring the employer toward mandatory benefit program participation, albeit in an indirect fashion.¹⁷⁵ However, while most court decisions see the tax code as simply regulating the tax consequences of the employer's benefit plan without creating a specific obligation to afford benefits to members of the non-permanent work force, some have taken a contrary approach.

In *Renda v. Adam Meldrum & Anderson Co.*,¹⁷⁶ the pension benefit claimant had spent many years working for a jeweler that had leased space from a department store to operate a jewelry sales and repair business. In securing her job, however, the claimant not only dealt with the operator of the jewelry franchise, but also with representatives of the department store's personnel office. In particular, she filled out an employment application from the department store, attended its orientation, wore its name tags for approximately twenty-eight years, and received various tokens of acknowledgment for her department store service.¹⁷⁷ The claimant also received her paychecks through the department store's payroll system for most of her employment period, although toward the end of her career, she received checks issued from the jeweler's account.¹⁷⁸

The department store had established its pension plan in 1976. The plan provided that an "associated employer had the option of adopting the plan on behalf of employees working in that associated employer's department."¹⁷⁹ The claimant's employer, however, declined to participate in the plan. Not surprisingly, the claimant never received a summary plan description nor was she ever notified that she was a participant in the pension program.¹⁸⁰ Nevertheless, when the claimant retired she sought benefits under the plan. The employer's Retirement Committee considered her claim, but ultimately determined that she was ineligible.¹⁸¹

In reviewing the claim, the district court recognized the relevance of a number of legal principles. These included: 1) the ERISA doctrine that whether

immediate deductibility of the benefit contribution by the employer, *id.* § 404; and tax deferment on the investment earnings of the plan, *id.* § 501.

175. This is most directly illustrated by the rules that bar employers from discriminating in favor of highly-compensated employees in the construction of their pension plans. To the extent employers feel the competitive necessity of offering such plans to their executives, they are pressured into offering non-highly compensated individuals participation rights as well. The provisions barring top-heavy pension plans from securing favorable tax treatment are contained in I.R.C. §§ 401(a)(4); 410(b); 414(q)(i) (1994 & Supp. II 1996), *as amended by Taxpayer Relief Act of 1997*, Pub. L. No. 105-134, 111 Stat. 788-1103.

176. 806 F. Supp. 1071 (W.D.N.Y. 1992).

177. *See id.* at 1074-75.

178. *See id.* at 1074.

179. *Id.* at 1075.

180. *See id.*

181. *See id.*

an individual is an employee is governed by common law agency rules,¹⁸² 2) the Internal Revenue Code's pension plan requirement that leased employees are to be counted as employees of the recipient where they provide services pursuant to a leasing agreement on a substantially full-time basis for at least one year, and where the services are of a type historically performed by employees in the recipient's business field,¹⁸³ 3) another Internal Revenue Code provision authorizing regulations to "prevent avoidance of any employee benefit requirement" listed in identified sections of the Internal Revenue Code through the use of employee leasing arrangements,¹⁸⁴ and 4) the doctrine that minimum participation, vesting and funding requirements for pensions under the Internal Revenue Code also apply to ERISA.¹⁸⁵

The factual circumstances surrounding the claimant's employment status led the court to conclude that she was a common law employee of the department store.¹⁸⁶ Then it evaluated the legal significance of that finding. In so doing, the court emphasized the relevance of ERISA's requirement that pension plans may not

require, as a condition of participation in the plan, that an employee complete a period of service with the employer or employers maintaining the plan extending beyond the later of the following dates—

- (i) the date on which the employee attains the age of 21; or
- (ii) the date on which he completes one year of service.¹⁸⁷

In the court's judgment, this language "effectively prohibit[ed] participation requirements which discriminate against certain employees such as leased employees,"¹⁸⁸ and specifically applied to pension plans, even though it was inapplicable to welfare benefit plans for which there are no minimum participation, funding or vesting requirements.¹⁸⁹ The court also observed that ERISA's minimum standards for plan participation call for eligibility for

182. *Id.* at 1077. The Supreme Court has ruled that in the absence of a more specific definition, use of the term "employee" in legislation refers to common law agency principles. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992).

183. *Renda*, 806 F. Supp. at 1078 (citing I.R.C. § 414(n)(2) (1994 & Supp. II 1996)). The historical test has since been replaced by a requirement that the individual's work must be under the primary direction and control of the employer before he can be considered a leased employee. Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1454(a), 110 Stat. 1755 (codified at I.R.C. § 414(n)(2)(C) (1994 & Supp. II 1996)).

184. *Renda*, 806 F. Supp. at 1078 n.5 (citing I.R.C. § 414(o) (1994)).

185. *Id.* at 1078.

186. *Id.* at 1079.

187. 29 U.S.C. § 1052(a)(1)(A) (1994).

188. *Renda*, 806 F. Supp. at 1081.

189. *Id.* In support of this principle, the court cited *Crouch v. Mo-Kan Iron Workers Welfare Fund*, 740 F.2d 805, 808 (10th Cir. 1984), where a union employee was held to be a participant in the union's pension program even though she was excludable from its welfare benefit plan.

employees after one year of service, normally encompassing 1000 hours of employment in a twelve-month period.¹⁹⁰ The court stated that relevant Treasury Department regulations are applicable to ERISA “not only for the purpose of determining the plan’s tax status, but also as persuasive authority in determining the rights of an employee to participation in an employee benefit plan.”¹⁹¹

Having concluded that the claimant was a common law employee of the department store, the *Renda* court found that she had met the minimum participation requirements of ERISA and was entitled to pension benefits.¹⁹² Inclusion was mandated by statute even though the claimant had never been treated as a plan participant in the pension program, and despite the fact that no contributions had been made on her behalf. In so ruling, the court rejected the view that the role of the relevant statutes was simply to determine the tax qualified status of the plan.¹⁹³ Instead, the court found that the legislation created participation rights, and therefore, the jewelry employer’s decision not to adopt the department store plan could not deprive the claimant of the option to claim pension benefits.¹⁹⁴ While she might have been able to voluntarily decline to participate in the pension program, she was never given that choice and thus no waiver theory was applicable.¹⁹⁵

The *Renda* decision was followed by a Colorado federal district court in *Bronk v. Mountain States Telephone & Telegraph, Inc.*,¹⁹⁶ although its ruling was subsequently reversed by the Tenth Circuit Court of Appeals.¹⁹⁷ In *Bronk*, the plaintiffs were leased employees who sought pension and welfare benefit plan coverage. Although the relevant plan documents indicated that coverage was only available for regular employees, the plaintiffs maintained that discrimination against individuals in their category was barred. In ruling on the claim, the district court found that the controlling issue was not “whether the administrator properly applied the terms of the plan; rather, it [was] whether, as a matter of law, the administrator was required to include [the p]laintiffs within the coverage provisions of the Plans.”¹⁹⁸ Since welfare benefit plans do not have minimum

190. *Renda*, 806 F. Supp. at 1081 (citing *Fernandez v. Brock*, 840 F.2d 622, 625 (9th Cir. 1988) (relying upon 29 U.S.C. § 1052(a)(3)(A) (1994))).

191. *Id.* at 1082.

192. This included a finding that she had worked a sufficient number of hours for the required number of weeks. *Id.* at 1079-80.

193. *Id.* at 1082.

194. *Id.* at 1083. Much of the court’s analysis of the effect of ERISA and the Internal Revenue Code is arguably dicta. Because the claimant was determined to be a common law employee, she had been erroneously excluded from the right to participate under the plan’s own terms. See D. Ward Kallstrom & Gregory D. Wellons, *Benefit Eligibility of “Contingent” Workers: Pitfalls for Employers and Administrators*, 9 BENEFITS L.J. 5, 19-20 (1996).

195. *Renda*, 806 F. Supp. at 1083.

196. 943 F. Supp. 1317 (D. Colo. 1996) [hereinafter *Bronk I*], *rev’d*, 140 F.3d 1335 (10th Cir. 1998) [hereinafter *Bronk II*].

197. *Bronk II*, 140 F.3d 1335 (10th Cir. 1998).

198. *Bronk I*, 943 F. Supp. at 1322.

participation, vesting, or funding requirements under ERISA, the court recognized that no claim for discriminatory exclusion from welfare benefit plan participation could be made.¹⁹⁹ However, the court concluded that the contrary was true for pension plans.²⁰⁰

The court specifically declined to follow the rationale of the *Abraham* and *Microsoft* rulings, which limited the role of ERISA and Internal Revenue Code provisions to determining the tax qualified status of benefit programs.²⁰¹ Following the *Renda* analysis, the court held that minimum participation, vesting, and funding requirements for pension programs are obligatory on plan administrators despite the language contained in the plan, and that the standards require the inclusion of leased workers who meet the definition of common law employees.²⁰² For the district court, ERISA barred discrimination against such individuals in pension plans, in addition to barring discrimination on the basis of age or length of service as long as statutory minimums were met.

A 1984 ruling of the Tenth Circuit Court of Appeals in *Crouch v. Mo-Kan Iron Workers Welfare Fund*²⁰³ represents an earlier example of the use of statutory principles to dictate the provision of benefits to employees who might otherwise have been excluded, although the case also incorporates contract-based analysis. *Crouch* involved a union secretary who had not been included in the union's welfare and pension benefit plans. Local union officials had concluded that she was not eligible, and therefore, they had not made any contributions on her behalf.²⁰⁴ The plan denied coverage for her since it had not received any transmissions from the local union indicating that the secretary was a participant. The court recognized that the language of the plan could be read to cover her, but noted that this was not a required reading.²⁰⁵ Furthermore, welfare benefit plans are not subject to ERISA participation, vesting, and funding requirements and, therefore, "the law permits a welfare plan to discriminate against particular

199. *Id.* at 1323.

200. *Id.*

201. *Id.* at 1325.

202. *Id.* The district court also rejected the argument that this result should be limited to plans which expressly incorporate statutory requirements. *Id.* In contrast, the Tenth Circuit Court of Appeals found the *Renda* analysis unpersuasive. *Bronk II*, 140 F.3d at 1338. It concluded that the relevant statutory language of ERISA does not bar discrimination against categories of workers even with respect to pension plans which are subject to participation, vesting and funding requirements. *Id.* The earlier decision of the Tenth Circuit in *Crouch v. Mo-Kan Iron Workers Welfare Fund*, 740 F.2d 805 (10th Cir. 1984), was deemed consistent because the relevant benefit plans at issue there stated that they were to comply with ERISA, the Internal Revenue Code, and applicable Treasury Department regulations. *Bronk II*, 140 F.3d at 1338. Absent such a provision in the benefit plan, "the tax-qualification provisions of the Code do not rewrite pension plans under ERISA § 202(a) to mandate inclusion of employees, leased or otherwise, whom the plans have permissibly excluded." *Id.* at 1339-40.

203. 740 F.2d 805 (10th Cir. 1984).

204. *See id.* at 807.

205. *Id.* at 808.

employees.”²⁰⁶ The court concluded that the decision to exclude the plaintiff was not arbitrary, capricious, or contrary to the plan in light of both the ambiguity of plan eligibility language and ERISA’s more limited regulation of welfare benefit plans.²⁰⁷

Despite upholding the exclusion of the plaintiff from the welfare plan, the *Crouch* court ruled that the secretary was entitled to benefits under the pension plan. The court reasoned that ERISA provides for minimum participation, vesting, and funding requirements in connection with pension plans, and no exception applied to the secretary.²⁰⁸ The court found additional support for its ruling in provisions of the Internal Revenue Code that mandate inclusion of the plaintiff in order for the pension plan to achieve tax advantaged status,²⁰⁹ as well as the requirement that the plan not violate anti-discrimination requirements by favoring highly compensated employees.²¹⁰ Up to this point, the court’s reasoning appeared to require coverage of the plaintiff by the pension plan because of the obligations created by existing legislation. However, the court also observed that “the pension plan state[d] that it is to be construed to meet the requirements of the ERISA.”²¹¹ Consequently, the decision can be read much like the ruling in *Microsoft* in that the plan documents incorporated federal standards, therefore it was arguably the plan itself that mandated coverage, not congressional legislation.²¹²

C. The ERISA Interference Problem

The Ninth Circuit ruling in *Inter-Modal Rail Employers Ass’n v. Atchison, Topeka & Sante Fe Railway Co.*²¹³ held that ERISA’s section 510 ban against interference with the attainment of any benefit was inapplicable to non-vestable welfare benefits.²¹⁴ On appeal to the Supreme Court, however, the prevailing respondents did not defend the Ninth Circuit’s holding. Instead, the respondents argued that the Ninth Circuit’s ruling was not necessarily that broad, and that its

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* at 809. The primary tax advantages are the deductibility of employer contributions when made, the non-taxability of fund earnings, and the deferral of taxation on benefits to the recipient until benefits are received. *See supra* note 174 and accompanying text.

210. *Id.* (citing I.R.C. § 401(a)(4) (1994 & Supp. II 1996)). The court also noted that the statute bans discrimination against employees under 25 who have worked for at least one year for a minimum of 1000 hours. *Id.* (citing I.R.C. § 410 (1994)).

211. *Id.* at 809.

212. The district court in *Bronk I* did not believe that this was essential to the *Crouch* result, *Bronk I*, 943 F. Supp. 1317, 1324 (D. Colo. 1996), while the Tenth Circuit found it to be a “critical fact.” *Bronk II*, 140 F.3d 1335, 1338 (10th Cir. 1998).

213. 80 F.3d 348 (9th Cir. 1996), *rev’d*, 117 S. Ct. 1513 (1997).

214. Respondent’s Brief at 15, *Inter-Modal Rail Employers Ass’n v. Atchison, Topeka & Sante Fe Ry. Co.*, 117 S. Ct. 1513 (1997) (No. 96-491).

decision could be read to apply to situations akin to vesting, such as “where participants are about to attain the right to claim a benefit.”²¹⁵ Even with this concession, the respondents argued that the language of section 510 could not be stretched to include claims of interference with an individual’s future entitlement to benefits, but must be read with the narrower view that the law only bars preventing a participant from reaching benefit eligibility.²¹⁶ The latter position would mean that section 510 had only limited applicability to welfare benefits once an employee had worked long enough to be included in the program because eligibility would have already been attained.

The Supreme Court ruling that non-vestable welfare benefit plans are not excluded from the anti-interference prohibition, only addressed the applicability of section 510 to welfare benefit plans.²¹⁷ The Court found it unnecessary to address the respondents’ alternative approach to the statute. However, the question of how far section 510 reaches is of enormous significance.²¹⁸ If courts interpret the reach of section 510 broadly, it would mean that companies would face significant restrictions on such restructuring techniques as outsourcing, subcontracting, or using leased employees to perform needed tasks. Where the ultimate result is that the new labor force has a benefit package less favorable

215. *Id.* at 16 n.8. This would be similar to a situation in which an employee is dismissed before rights under a pension plan vest, the prototype section 510 violation. *See* *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990). The suggested theory would thus prevent an employer from interfering with an employee reaching eligibility to file a claim for a non-vestable benefit, as well as barring employers from preventing employees from attaining the point where a vestable benefit right accrues.

216. Respondent’s Brief at 17, *Inter-Modal Rail Employees Ass’n*, 117 S. Ct. 1513 (1997) (No. 96-491). *See also* *Corum v. Farm Credit Servs.*, 628 F. Supp. 707, 718 (D. Minn. 1986) (“Where the only evidence that an employer specifically intended to violate ERISA is the employee’s lost opportunity to accrue additional benefits, the employee has not put forth sufficient evidence to defeat summary judgment.”); *Baker v. Kaiser Aluminum and Chem. Corp.*, 608 F. Supp. 1315, 1318-19 (N. D. Cal. 1984). However, a comparable argument had been rejected by the Seventh Circuit in *Kross v. Western Electric Co.*, 701 F.2d 1238 (7th Cir. 1983). There, the court found that this position was inconsistent with the broad language used by Congress in section 510, *id.* at 1242, and observed that it would create the anomalous result of affording protection to probationary workers who had not yet qualified for benefit plan participation while excluding senior employees who had. *Id.* at 1243. *See also* *Gitlitz v. Compagnie Nationale Air France*, 129 F.3d 554, 558 (11th Cir. 1997); *Seaman v. Arvida Realty Sales*, 985 F.2d 543, 546 (11th Cir. 1993) (“The validity of a § 510 claim does not hinge upon whether the benefits involved are vested but upon the purpose of the discharge.”). *See generally* Dana M. Muir, *Plant Closings and ERISA’s Noninterference Provision*, 36 B.C. L. REV. 201, 240-42 (1995).

217. This issue was remanded to the lower courts for further findings. *Inter-Modal Rail Employees Ass’n*, 117 S. Ct. at 1517.

218. One commentator described the *Inter-Modal* ruling as “not surprising,” but added that it is “sitting on top of a very large issue of tremendous significance . . . [namely] what role can the cost of providing benefits play in making decisions on the movement of jobs?” *Court Leaves Outsourcing, Benefits Issues Unsettled*, 155 Lab. Rel. Rep. (BNA) 314, 315 (July 7, 1997).

than the one provided to the replaced workers, arguably the substitution interferes with the attainment of ERISA-protected benefits by the latter group. The case law thus far, however, does not provide a clear answer to the questions surrounding the reach of section 510.

The broadest support for utilizing section 510 to restrain company actions that adversely affect employee benefits is found in *Galvalik v. Continental Can Co.*²¹⁹ There the Third Circuit was confronted with a broad "liability avoidance" scheme established by the company to minimize benefit costs in response to the company's steady business decline in the mid-1970s. As described by the court, the company "had two complimentary objectives: to identify Continental's unfunded pension liabilities so as to avoid triggering future vesting by placing employees who had not yet become eligible for break-in-service on layoff, and to retain those employees whose benefits had already vested."²²⁰ Furthermore, "plant managers were authorized to shift business to plants that either had low unfunded pension liability or plants that needed the work in order to retain employees with vested 70/75 benefits."²²¹

In considering the applicability of section 510 to the Continental program, the court noted that interference with pension rights need not be the sole reason for an adverse employee action. However, the plaintiff must still demonstrate that the employer had the specific intent to violate ERISA, supported by evidence beyond the mere fact that benefits were lost as a result of employee terminations.²²² Meeting this burden would require the plaintiff to demonstrate prohibited employer conduct taken for the purpose of interfering with the attainment of ERISA rights, with the burden then shifting to the employer to demonstrate a legitimate, non-discriminatory reason for its actions.²²³ The plaintiff could then demonstrate that the proffered reason was pretextual or not credible.²²⁴

219. 812 F.2d 834 (3d Cir. 1987).

220. *Id.* at 840.

221. *Id.* The 70/75 pension was a system that allowed certain employees to qualify for pension benefits before reaching the age of 62 if (1) the employee had at least 15 years of continuous service, was 50 years or older, and had combined age and service greater than 70 years, or (2) with 15 years of continuous service, the employee's combined age and service equaled 75 or more, regardless of the individual's age. *See id.* at 838-39.

222. *See id.* at 851. In support of these principles, the court cited *Titsch v. Reliance Group, Inc.*, 548 F. Supp. 983 (S.D.N.Y. 1982), *aff'd*, 742 F.2d 1441 (2d Cir. 1983), and *Watkinson v. Great Atl. & Pac. Tea Co.*, 585 F. Supp. 879, 883 (E.D. Pa. 1984). The specific intent requirement has been described as a mechanism for balancing "the need to protect the employment relationship with the preservation of employers' general rights to control their employment decisions and to operate in an efficient and profitable manner." Dana M. Muir, *ERISA Remedies: Chimera or Congressional Compromise?*, 81 IOWA L. REV. 1, 7 (1995).

223. *See Galvalik*, 812 F.2d at 853.

224. *See id.* The allocation of burdens of proof followed the pattern established for Title VII in *McDonald Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). *See id.* at 852. *See generally* Christina A. Smith, *The Road to*

Applying the applicable burden of proof standard, the *Galvalik* court concluded that the factual findings of the district court established the existence of a section 510 violation. From the court's perspective, "if Continental's liability avoidance scheme [did] not constitute direct proof of discrimination under section 510, we are hard pressed to imagine a set of facts that would."²²⁵ Therefore, the appellate court reversed the denial of relief by the district court. The court found that section 510 is applicable where it is shown that there were "deliberate steps undertaken for the purpose of interfering with the appellants' attainment of pension eligibility,"²²⁶ even in the absence of a showing of an actual deprivation of rights. The case was ultimately remanded to the district court with directions that it determine the eligibility of various plaintiffs for damages, while at the same time affording the employer the opportunity to prove that the affected employees, individually or as a group, would have been treated the same way even in the absence of the liability avoidance program.²²⁷

In a somewhat similar fashion, "smoking-gun" evidence established a section 510 violation in *Pickering v. USX Corp.*²²⁸ Under the operative collective bargaining agreement between the company and the United Steel Workers of America, laid-off employees continued to accumulate service for pension purposes for two years, and the two-year period renewed if the laid-off employee was recalled. Managers were therefore encouraged to avoid recalling workers on layoff status in order to prevent them from becoming re-entitled to benefits that would have otherwise expired.²²⁹ There was also a dramatic increase in plant overtime and subcontracting during the same period.²³⁰ The court found this evidence sufficient to establish a *prima facie* case that the company avoided recalling laid-off employees for the specific purpose of minimizing future pension liability.²³¹ The company sought to negate the inference of discrimination by pointing to the depressed condition of the steel industry, the cumbersome and inefficient character of the recall process, and the fact that seniority requirements were not violated.²³² Nevertheless, the court ultimately concluded that the stated reasons were pretextual.²³³

A more recent decision from the Eleventh Circuit Court of Appeals, *Gitlitz*

Retirement—Paved with Good Intentions but Dotted with Potholes of Untold Liability: ERISA Section 510, Mixed Motives and Title VII, 81 MINN. L. REV. 735 (1997).

225. *Galvalik*, 812 F.2d at 856.

226. *Id.*

227. *Id.* at 865-66.

228. 809 F. Supp. 1501 (D. Utah 1992).

229. *See id.* at 1534-35.

230. *See id.* at 1534. The logical inference from this fact was that overtime and subcontracting were used to avoid recalling laid-off employees. *See id.* at 1537.

231. *Id.* at 1536-37.

232. *See id.* at 1537-38.

233. *Id.* at 1550-51. In addition, the court found that company's separate decision to idle its plant following a work stoppage also violated section 510 on the basis of evidence that the idle decision was made for the purpose of avoiding pension obligations. *Id.* at 1551-52.

v. *Compagnie Nationale Air France*,²³⁴ illustrates the potential applicability of section 510 to an employer's conversion of his work force from an employer/employee to an independent contractor relationship. The suit was filed by two outside sales employees of Air France who were converted to independent contractor status. Both employees were eligible for early retirement benefits at the time of the conversion, but were informed that they could not receive them if they continued to work for Air France as independent contractors, and that they would not accrue additional retirement benefits following the change in their status.²³⁵ The plaintiffs produced evidence that there was no change in the job functions the sales representatives performed as independent contractors. The only justification the company offered for the conversion was its desire to improve work force motivation.²³⁶ The court concluded that the evidence was sufficient to demonstrate a specific intent to interfere with ERISA rights and thus survive a motion to dismiss.²³⁷ The court based its conclusion on the fact that the only feature of the company's new independent contractor arrangement linked to the improvement of worker motivation was a bonus method of compensation which could have easily have been incorporated into the discontinued employer/employee system.²³⁸

Decisions from other jurisdictions, however, have been less supportive of employee section 510 claims. For example, in *Andes v. Ford Motor Co.*,²³⁹ the claimants sought to rely on section 510 to challenge their loss of benefits following a decision by the Ford Motor Company to sell its Dealer Computer Services subsidiary. It was clear that the employees, after transfer to the purchaser, received reduced benefits. However, Ford was able to establish a legitimate reason for selling off the unit since it was not a core function, and at the time, the company had been experiencing serious economic losses.²⁴⁰ Its argument that company resources could be spent more effectively on other activities was sufficient to rebut the plaintiffs' claim.²⁴¹ Of particular significance was the court's observation that in organizational change cases, "the courts of appeals have thought it inappropriate to afford plaintiffs a full trial in order to determine how much of a company's motivation can be attributed to a desire to avoid benefit costs."²⁴² In contrast, courts have been reluctant to grant employers summary judgment in cases where individual employees have been discharged.²⁴³ In the court's view, this suggested that "a corporate organizational

234. 129 F.3d 554 (11th Cir. 1997).

235. See *id.* at 556-59.

236. See *id.* at 559.

237. *Id.* at 560.

238. *Id.*

239. 70 F.3d 1332 (D.C. Cir. 1995). See generally Andre P. Barlow, *Loss of Retirement Benefits After Corporate Sale Does Not Violate ERISA*, 65 GEO. WASH. L. REV. 764 (1997).

240. See *Andes*, 70 F.3d at 1333.

241. See *id.*

242. *Id.* at 1337.

243. See *id.* However, a court will dismiss a section 510 complaint where there is no

change that results in the termination of employees is really not a prototype of the sort of action that section 510 was primarily designed to cover.”²⁴⁴

In a similar fashion, the plaintiffs in *Nemeth v. Clark Equipment Co.*²⁴⁵ were unable to establish a section 510 violation when the company closed the plant where they worked and shifted production to another facility. This step had been taken by the company after sharp losses raised the distinct possibility of bankruptcy, leading the company to conclude that it needed to reduce production capacity and overhead costs.²⁴⁶ Plaintiffs were able to establish that defeating pension eligibility was a significant factor in the company’s decision because pension costs amounted to slightly more than one-fifth of the operating cost differences between the plant closed and the plant retained.²⁴⁷ The court rejected the company’s defense that its action could be justified because of the legitimate motivation of halting mounting economic losses on the grounds that this would defeat the purpose of section 510.²⁴⁸ Nevertheless, the evidence established that pension considerations were only one of many factors, and “no single factor standing alone motivated or dominated” the plant closure decision.²⁴⁹ As in *Andes*, the court rejected the notion that section 510 is only applicable in cases of individual termination decisions as opposed to more generalized corporate policy actions.²⁵⁰ The court found that the plaintiffs’ section 510 claim could not be sustained, however, concluding that the company would have reached the same closure decision “even if it had ignored the cost of the pension plan altogether.”²⁵¹

Looking at existing court decisions, a pattern emerges in section 510 cases involving claims of interference with employees’ attainment of ERISA benefit rights. The employer’s actions have usually been immune from attack where the loss of benefits is attributable to corporate organizational changes that appear to have multiple justifications.²⁵² This has been true in decisions from the Third,²⁵³

evidence of an employer intent to interfere with benefit rights, even if the plaintiff has suffered a loss of benefits in fact. See *DeVoll v. Burdick Painting, Inc.*, 35 F.3d 408, 410-11 (9th Cir. 1994).

244. *Andes*, 70 F.3d at 1337. The court recognized that there may be situations where § 510 is applicable to organizational changes, for example where the company closes a unit because a very high proportion of its employees are at the verge of becoming eligible for significant benefits. *Id.* at 1338.

245. 677 F. Supp. 899 (W.D. Mich. 1987).

246. See *id.* at 902.

247. See *id.* at 904.

248. *Id.* at 905.

249. *Id.* at 906.

250. *Id.* at 906-07.

251. *Id.* at 909.

252. Employers have argued that ERISA is not applicable to structural changes which affect the benefit status of the work force, but the response has generally been that “ERISA does not distinguish between the termination of one employee and the termination of 100 employees. Either action is illegal if taken with the purpose of avoiding pension liability.” *Id.* at 907. The arguments in favor of the applicability of ERISA in such circumstances are explored in Muir, *supra* note 222,

Fifth²⁵⁴ and Eleventh²⁵⁵ Circuit Courts of Appeals. Additionally, employers are free to modify or terminate the plans even though this may adversely affect benefit levels for employees.²⁵⁶ In contrast, individual termination decisions are likely to be more carefully scrutinized.²⁵⁷ However, this does not necessarily mean that section 510 will unduly restrain the employer from taking the contemplated action.

III. LEGISLATIVE AND PRIVATE SECTOR ALTERNATIVES

There is little reason to doubt that contingent employment has become both a significant and permanent part of the American labor market. Employers have found that such work arrangements meet their business needs, and often do so at

at 223-40.

253. See *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192 (3d Cir. 1993), *cert. denied*, 510 U.S. 1042 (1994) (no section 510 complaint stated where the company sold unprofitable subsidiaries and their associated underfunded pension plans since employee/participants maintained their participation after the transaction).

254. See *Unida v. Levi Strauss & Co.*, 986 F.2d 970 (5th Cir. 1993) (no ERISA violation in plant closing due to decrease in demand for company product even though nearly four hundred workers lost the opportunity to have their pensions vest and a plant in the Caribbean operated under a program to encourage investment in certain countries remained open).

255. See *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488 (11th Cir. 1993) (general motivation to reduce operating costs insufficient for section 510 claim); see also *Phillips v. Amoco Oil Co.*, 799 F.2d 1464 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987) (no section 510 claims stated in the context of the sale of an entire business).

256. See *DeVoll v. Burdick Painting, Inc.*, 35 F.3d 408 (9th Cir. 1994), *cert. denied*, 514 U.S. 1027 (1995) (finding that an employer committed no violation in decision to change employee medical plan; this does not constitute interference with an employee's use of benefits); *Izzarelli v. Rexene Prods. Co.*, 24 F.3d 1506 (5th Cir. 1994) (finding that employer does not violate fiduciary standards in acting to terminate, amend, or renegotiate non-vested benefit plan); *McGann v. H & H Music Co.*, 946 F.2d 401 (5th Cir. 1991), *cert. denied*, *Greenberg v. H & H Music Co.*, 506 U.S. 981 (1992) (finding no ERISA violation in reduction of benefits under health plan for HIV claimants); *Reichelt v. Emhart Corp.*, 921 F.2d 425 (2d Cir. 1990), *cert. denied*, 501 U.S. 1231 (1991) (finding no ERISA violation committed by employer who amended severance plan in the context of a business sale).

257. In *Seaman v. Arvida Realty Sales*, 985 F.2d 543 (11th Cir. 1993), for example, real estate sales persons were required to execute independent contractor agreements to continue working for the company so that the employer would no longer have to contribute to the retirement and health insurance programs on their behalf. *Id.* at 544. The decision did not reveal any corporate organizational change. Although this was held a section 510 violation, the court emphasized that the company was not barred by the ruling from either modifying or eliminating the plans entirely. *Id.* at 546-47. In a similar fashion, the court in *Gitlitz v. Compagnie Nationale Air France*, 129 F.3d 554 (11th Cir. 1997), held that section 510 was applicable to the conversion of outside sales representatives to independent contractor status for the purported objective of improving worker motivation. *Id.* at 559-60.

a lower cost than that associated with traditional permanent employees.²⁵⁸ In part, this is due to the employer's ability to create an exclusively contingent work force, or implement a two-tier employment system, with those in the contingent employment category excluded from participation in benefit programs available to the permanent work force.²⁵⁹ The only risk employers face in pursuing such a structure is if their benefit plans do not clearly exclude contingent employees, as in *Microsoft*,²⁶⁰ or where the employer seeks to convert his permanent work force into a contingent one for the specific purpose of interfering with the employees' workplace benefits, as in *Inter-Modal*.²⁶¹

Employers, of course, are subject to labor market constraints in their efforts to create exclusively contingent or two-tier employment structures. Particularly in a vibrant economy with labor market shortages, it may prove necessary to provide benefits to all employees in order to attract needed workers. This can be accomplished either by directly offering benefits to contingent employees, or paying the extra cost of securing workers through staffing agencies which provide these benefits. Nevertheless, this does not occur in all situations,²⁶² and

258. Part of the reason is the generally lower wage contingent employees receive. See Belous, *supra* note 35, at 873-75; Jonathan P. Hiatt & Lynn Rhinehart, *The Growing Contingent Workforce: A Challenge for the Future*, 1993 Daily Lab. Rep. (BNA) No. 154, at d23 (Aug. 12, 1993). Also important is the fact that contingent workers are less likely to receive workplace benefits. See *supra* note 10. Additionally, the use of a contingent work force may allow the employer to shift training expenses to the employee or to the firm providing the leased or temporary help. See *Growth of Contingent Workforce Posing Policy Questions; Benefit Equities Debated*, 1988 Daily Lab. Rep. (BNA) No. 98, at A11 (May 20, 1988).

259. See *supra* note 10.

260. *Microsoft Corp. I*, 97 F.3d 1187 (9th Cir. 1996), *aff'd on reh'g*, *Microsoft Corp. II*, 120 F.3d 1006 (9th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 899 (1998). It remains to be seen whether the Time Warner benefit plan and employee classification structure recently challenged by the U.S. Department of Labor contains the same flaw as the Microsoft system. See Schlesinger & Shapiro, *supra* note 15.

261. *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry.*, 117 S. Ct. 1513 (1997). Nothing in *Inter-Modal*, or in other cases decided pursuant to section 510 of ERISA, necessarily suggests that there are any restraints on the creation of new contingent employment relationships in which benefits are not provided, as opposed to situations, in which existing employees with benefits are converted to contingent employees without benefits. Nevertheless, arguably the purposeful creation of positions designed to avoid benefit eligibility may constitute a section 510 violation. See Gwen Thayer Handelman, *On Our Own: Strategies for Securing Health and Retirement Benefits in Contingent Employment*, 52 WASH & LEE L. REV. 815, 833-34 (1995).

262.

Agencies that lease contingent workers to other companies do sometimes provide their workforce with certain employee benefits (especially group life and health insurance), but this practice is most commonly found in the case of executive, professional, and other highly skilled workers, and the workers often pay a substantial portion of the cost of the coverage.

the issue of contingent employee exclusion from benefit program eligibility remains a significant public policy question.

One possible solution to this problem entails imposing a general legal obligation on employers to provide specific benefits to all workers, including contingent employees. However, there is no realistic prospect that any such legislation will be enacted in the foreseeable future, even though this would ensure worker benefit coverage. The controversy generated by the health care proposals of President Clinton during his first administration demonstrates that there is significant resistance to mandating even as critical a benefit as health insurance,²⁶³ but this is merely an illustration of the more general reluctance of Congress to interfere with the virtually complete freedom of choice employers now have in deciding whether to make any workplace benefits available. Nor is there any sign that the states are prepared to fill the gap by creating new employer obligations because to do so would create a competitive disadvantage with neighboring states in the effort to lure businesses to relocate.

ERISA²⁶⁴ and the Internal Revenue Code,²⁶⁵ the legislative schemes most directly applicable to workplace benefit programs, contain few limitations on the creation of contingent employment arrangements that deny non-traditional workers benefit program rights. Both largely address themselves to benefit requirements with respect to traditional employees, and have little to say about any duties employers might have to provide benefits to contingent workers. Where contingent employment is recognized, employers are generally given unrestricted discretion in deciding whether or not to include contingent workers in their benefit plans.

Part-time workers illustrate one aspect of this issue. As long as an employer restricts his employees to a work year below the applicable legal threshold,²⁶⁶ he

Kallstrom & Wellons, *supra* note 194, at 6. See also Judy Greenwald, *Temp Agencies Offering Full-Time Benefits*, BUS. INS., Dec. 9, 1996, at 3.

263. Initially there was some optimism that the President's health care reform proposals would be adopted, although perhaps in a piecemeal fashion. See, e.g., Hammond, *supra* note 33, at 163. In the end, however, the President's proposals were defeated, and as one commentator has opined, this may have been "the catalyst . . . producing the first Republican Congress in 40 years." Albert Hunt, *Politicians Risk Voter Backlash This Autumn if They Ignore Call for Action*, WALL ST. J., June 25, 1998, at A9.

264. 29 U.S.C. §§ 1001-1461 (1994 & Supp. II 1996), as amended by Taxpayer Relief Act of 1997, Pub. L. No. 105-134, 111 Stat. 788-1103 (Aug. 5, 1997).

265. I.R.C. §§ 1-9602 (1994 & Supp. II 1996), as amended by Taxpayer Relief Act of 1997, Pub. L. No. 105-134, 111 Stat. 788-1103 (Aug. 5, 1997).

266. For purposes of ERISA, which regulates participation standards, the accrual of benefits, and the vesting of pension rights for an employer's own employees, the law focuses on whether the employee worked in excess of 1000 hours during the year. 29 U.S.C. §§ 1052 (a)(1), 1052 (a)(3)(A) (1994). See also Edward A. Lenz, *Co-Employment—A Review of Customer Liability Issues in the Staffing Services Industry*, 10 LAB. LAW. 195, 211 (1994). Pension plan participation may be limited to employees who meet this standard. See I.R.C. §§ 410 (a)(1)(A)(ii), (a)(3)(A) (1994). In contrast, where the issue is whether to count leased employees to determine the tax

is under no duty to include such part-time workers in the company's benefit system. While it is true that employers are not prohibited from allowing part-time workers to participate in company benefit programs, and many have found such a policy competitively advantageous,²⁶⁷ there is no legal requirement that they do so. Proposals to provide at least pro-rata benefit program rights to part-time workers have been unable to garner the support necessary for enactment.²⁶⁸

A second illustration is provided by the special requirements applicable to leased employees. Benefit program restrictions relating to leased workers were imposed as a result of employer efforts to avoid prohibitions against 'top-heavy' pension plans which unduly favored highly compensated employees.²⁶⁹ Some employers attempted to circumvent prohibitions against such pension programs by transferring their non-highly compensated staff to leasing agencies, and restricting pension plan participation to the highly compensated personnel who remained.²⁷⁰ In response to this abuse, Congress imposed a requirement

qualified status of a pension plan, those who work on a "substantially full-time" basis, or generally more than 1500 hours in a year, must be included in the calculation. Internal Revenue Code § 414(n)(2)(B) (Supp. II 1996) contains the statutory "substantially full-time" basis standard. Proposed IRS regulations set a figure of 1500 hours or 75% of the median hours worked by employees performing similar services for the employer, with a minimum of 501 hours. See Hammond, *supra* note 33, at 185-90. The structure of the law has therefore led employers to maintain pools of on-call workers whose hours are kept below the 1000 hour limit in order to avoid benefit obligations without jeopardizing the tax qualified status of the plan. See Francoise J. Carre, *Temporary Employment in the Eighties*, in NEW POLICIES FOR THE PART-TIME AND CONTINGENT WORKFORCE, 78, 78-79 (Virginia du Rivage, ed. 1992).

267. This was illustrated in United Parcel Service ("UPS") strike during the summer of 1997. UPS is a large employer of part-time workers, and as a matter of company policy it provides them with benefit program participation rights. See Nancy Ann Jeffrey, *Families of Some UPS Strikers Express Concerns About Health-Care Coverage*, WALL ST. J., Aug. 15, 1997, at A2.

268. See Part-Time and Temporary Workers Protection Act, H.R. 2118, 103d Cong., 1st Sess. (1993). This proposed legislation would have made pro-rata pension and health benefits available to all employees who worked more than 500 hours during the year. See Kenneth G. Dau-Schmidt, *The Labor Market Transformed: Adapting Labor and Employment Law to the Rise of the Contingent Work Force*, 52 WASH. & LEE L. REV. 879, 886-87 (1995) (advocating proportionate benefits for contingent workers); Patricia Schroeder, *Does the Growth in the Contingent Work Force Demand a Change in Federal Policy?*, 52 WASH. & LEE L. REV. 731, 736-37 (1995).

269. In order to secure favorable tax treatment, employer pension plans are barred by the Internal Revenue Code from discriminating in favor of "highly compensated employees." I.R.C. §§ 401(a)(4), 410(b), 414(q)(i) (1994 & Supp. II 1996), as amended by Taxpayer Relief Act of 1997, Pub. L. No. 105-134, 111 Stat. 788-1103 (Aug. 5, 1997).

270. Internal Revenue Code § 401(a) requires that retirement plans be maintained "for the exclusive benefit of . . . employees and their beneficiaries," *id.* § 401(a), thus barring favorable tax treatment for plans which include non-employees. See *Professional & Executive Leasing, Inc. v. Comm'r*, 862 F.2d 751 (9th Cir. 1988) (leasing agency plan which included its leased workers ineligible for favorable tax treatment because workers were employees of recipient employers). According to one commentator, the leased employee rules were prompted by a "narrow abuse"

contained in Internal Revenue Code § 414(n) that leased employees must be counted for purposes of determining whether the company's benefit program unlawfully discriminated in favor of highly compensated personnel.²⁷¹

In order to be considered a leased employee under Internal Revenue Code § 414(n), and therefore countable for purposes of determining the plan's eligibility for favorable tax treatment, the services must be performed under an agreement between the recipient employer and the leasing organization, and the worker must generally have been employed for at least 1500 hours during a one-year period.²⁷² The Small Business Job Protection Act of 1996²⁷³ added the requirement that the leased employee's work must be performed under the primary direction and control of the recipient.

If the employer is careful in his use of leased workers, the Internal Revenue Code's 'counting' requirement is likely to be of marginal significance. First, the employer can limit his use of leased workers to less than 1500 hours during the year. Alternatively, employers can utilize leasing agencies which provide supervision along with a staff of leased workers since the right of control in such an arrangement would not be vested in the employer.²⁷⁴ It is also generally true that leased professionals, such as attorneys, accountants, doctors, systems analysts, and engineers, who normally use independent judgment and discretion in performing their functions, are unlikely to be considered leased workers for purposes of determining a plan's eligibility for favored tax treatment.²⁷⁵

engaged in by certain small professional groups who were firing their entire staffs, transferring them to the payroll of a leasing organization, and then setting up rich pension plans for themselves. LENZ, *supra* note 33, at 22.

271. I.R.C. § 414(n) (1994 & Supp. II 1996).

272. Internal Revenue Code § 414(n)(2)(B) requires that companies count leased employees who work on a "substantially full-time" basis. *Id.* § 414(n)(2)(B) (Supp. II 1996). Proposed IRS regulations set a figure of 1500 hours or 75% of the median hours worked by employees performing similar services for the employer, with a minimum of 501 hours. *See* Hammond, *supra* note 33, at 185-90.

273. Pub. L. No. 104-188, § 1454(a), 110 Stat. 1755 (codified at I.R.C. § 414(n)(2)(C) (Supp. II 1996)). The 'direction and control' test replaced the previous requirement that the work be of a type historically performed by employees in the recipient's field of business. The new test narrows the applicability of the leased employee rules. *See* LENZ, *supra* note 33, at 23; Kallstrom & Wellons, *supra* note 194, at 13. According to one commentator, the prior historical performance test focused on "whether, as an industrial practice, the services being performed are those that are typically performed by persons treated as employees of the service recipient." Hammond, *supra* note 33, at 161, 184.

274. *See* LENZ, *supra* note 33, at 23 ("[C]ustomers will not have to count a third-party employee as a potential leased employee in cases where the employee's work is directed and controlled primarily by the staffing firm and not the customer."). However, the right of control test is measured by the totality of the circumstances, and retention of some supervision rights by the employer may be enough to trigger applicability of the leased employee rules.

275. This conclusion is based on the legislative history behind the new right of control test for determining leased worker status contained in the Small Business Job Protection Act of 1996,

Furthermore, workers are not treated as countable leased employees if they participate in a "safe-harbor" pension plan provided by the leasing organization,²⁷⁶ and customers receive a credit for any benefits their leased workers receive from the leasing firm.²⁷⁷ In the final analysis, the system ensures limited applicability of the leased employee restrictions contained in the Internal Revenue Code. But in any event, the predominate judicial view of these provisions is that they only serve to determine the tax qualified status of a benefit plan, and do not encompass a leased employee right of participation.²⁷⁸

Employers who do not use employee leasing agencies to create contingent employment arrangements in order to avoid benefit costs may achieve the same result through the use of independent contractors. There is a well-established principle in the common law which distinguishes between employees and independent contractors based upon the degree of control retained by the employer over the manner in which the work is performed.²⁷⁹ The distinction has become relevant for a number of employment law purposes.²⁸⁰ The relevance of the distinction for employee benefit programs is that service providers who fit within the independent contractor category will normally be deemed ineligible for participation in any plan provided by the employer for the exclusive benefit of his employees.²⁸¹

and arises from the view that such workers "regularly make use of their own judgment and discretion on matters of importance in the performance of their services and are guided by professional, legal or industry standards." *Id.*

276. See I.R.C. § 414(n)(5) (1994). The requirements are that the leasing organization must contribute at least 10% of the employee's compensation to the plan, the employee must be 100% vested in the contribution, and all employees of the leasing organization must be eligible to participate without a waiting period. See LENZ, *supra* note 33, at 2.

277. See I.R.C. § 414(n)(1)(B) (1994); LENZ, *supra* note 33, at 25-26.

278. See *supra* notes 142-72 and accompanying text.

279. The common law used the concept of an employee to govern situations in which employers could be held vicariously liable for the conduct of their workers. In contrast, vicarious liability was not imposed on anyone who hired an independent contractor to perform services. See, e.g., COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, REPORT AND RECOMMENDATIONS 37 (1994) [hereinafter DUNLOP COMMISSION REPORT]; ROTHSTEIN & LIEBMAN, *supra* note 52, at § 2.28; Jennifer Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt, or Organize?*, 22 N.Y.U. REV. L. & SOC. CHANGE 557, 576 (1996).

280. Independent contractors are excluded from coverage in the Occupational Safety and Health Act of 1970 § 3(6), 29 U.S.C. § 652(6) (1994), the National Labor Relations Act § 2(3), 29 U.S.C. § 152(3) (1994), and under state workers compensation statutes, e.g., MASS. GEN. LAWS ANN. ch. 152 § 1(4) (West 1988), and unemployment insurance codes, e.g., CAL. UNEMP. INS. CODE § 621 (West 1988).

281. If the plan is available for employees, independent contractors are, by definition, ineligible. The exclusion of non-employees is furthered under the provisions of the Internal Revenue Code that limit favorable tax treatment to those employer retirement plans which are maintained for the exclusive benefit of employees and their beneficiaries. I.R.C. § 401(a) (1994 & Supp. 1996).

Because independent contractors are not employees, employers are initially relieved of the burden of withholding employment taxes,²⁸² and paying the employer portion of Social Security²⁸³ and Unemployment Insurance²⁸⁴ for those who properly fit within the independent contractor category.²⁸⁵ The issue of how a worker should be classified, therefore, is of immediate financial significance. This determination is made by applying a twenty-factor test contained in a 1987 Revenue Ruling²⁸⁶ to evaluate the degree of control retained by the employer over the manner in which the work is performed. The test has been the subject of a published training manual designed to give guidance to both Internal Revenue Service staff and the general public on worker classification standards.²⁸⁷

282. The Internal Revenue Code contains no specific definition of an employee for purposes of withholding tax procedure. However, wages subject to withholding are defined as all remuneration "for services performed by an employee for his employer," *id.* § 3401(a), even though the definition of an employee under the code has no content other than to include government workers and officers of corporations, *id.* § 3401(c). Nevertheless, existing case law indicates judicial reliance on the common law right of control test. *See Marvel v. United States*, 719 F.2d 1507, 1514 (10th Cir. 1983); *Lanigan Storage & Van Co. v. U.S.*, 389 F.2d 337 (6th Cir. 1968). Independent contractors must pay their tax obligations directly since they are not employees for withholding tax purposes.

283. The provisions of the Federal Insurance Contribution Act ("FICA"), I.R.C. §§ 3101-3128 (1994 & Supp. II 1996), adopt the common law rules for determining employee status. *Id.* § 3121(d)(2) (1994).

284. Pursuant to the Federal Unemployment Tax Act ("FUTA"), I.R.C. §§ 3301-3311 (1994 & Supp. II 1996), employee status is also governed by the common law right of control test. *Id.* § 3306(i) (1994).

285. In contrast, in leased employee arrangements the worker is not considered an employee if the company utilizing his services retains the right to control the manner in which he performs his work, but the responsibility for all payroll taxes falls on the leasing agency that handles the payment of wages. *See General Motors Corp. v. United States*, No. 89-CV-73046-DT, 1990 WL 259676 (E.D. Mich. Dec. 20, 1990) (mem.); Hammond, *supra* note 33, at 178-81.

286. Rev. Rul. 87-41, 1987-1 C.B. 296. The Ruling applies for classification decisions under FICA, I.R.C. §§ 3101-3128 (1994 & Supp. II 1996), and FUTA, I.R.C. §§ 3301-3311 (1994 & Supp. II 1996). The Revenue Ruling's test for determining whether an employment relationship exists focuses on whether "the person or persons for whom the services are performed have the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished." Rev. Rul. 87-41, 1987-1 C.B. 296. Relevant factors include whether the worker receives training and is instructed by the employer, performs the work on the employer's premises, is paid based upon time worked rather than receiving a set fee for the job, provides his own tools, and has the opportunity for profit or loss. *Id.*

287. INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, EMPLOYEE OR INDEPENDENT CONTRACTOR? (1996). A training manual proved to be necessary because the Internal Revenue Service was barred by statute from issuing any clarifying regulations or rulings on the subject of independent contractor classifications. *See Revenue Act of 1978*, Pub. L. No. 95-600, § 530(4)(b),

Business interests have persistently complained that the independent contractor standards are vague and subject to conflicting interpretations.²⁸⁸ This can result in the inadvertent misclassification of workers, which if detected in an IRS audit, may lead to substantial monetary consequences for the offending employer.²⁸⁹ However, other critics complain that employers engage in widespread employee misclassification for the explicit purpose of avoiding employment tax and benefit obligations.²⁹⁰ Where this occurs, the tax and benefit burden is unfairly shifted to the worker and the U.S. Treasury is adversely affected because of the greater difficulty experienced in collecting taxes from independent contractors.²⁹¹

Due to the potential penalties and tax assessments applicable to erroneous independent contractor classification decisions, Congress added section 530 to the Revenue Act of 1978 (the "Act").²⁹² It prohibits the IRS from penalizing misclassifications where there was a reasonable basis for the employer's belief that the independent contractor classification was correct.²⁹³ In forming a reasonable basis, the Act permits the employer to rely upon judicial precedent, prior IRS audits, or a long-recognized practice in the industry.²⁹⁴ The legislation also bars the IRS from issuing any regulations on the employment status of any worker for employment tax purposes, thus preventing the use of the administrative process to clarify worker classification uncertainties.²⁹⁵ Some

92 Stat. 2763.

288. See *Tax Issues Impacting Small Business: Hearing Before the Senate Comm. on Small Business*, 104th Cong. 47 (1995) (statement of Michael O. Roush) [hereinafter 1995 *Small Business Hearing*]. See also *id.* at 83, 85 (statement of Senator Don Nickles) (observing that "Congress has amazingly failed to give workers or businesses adequate guidance as to who is an employee and who is an independent contractor," and that the Treasury Department recognizes that "reasonable persons may differ as to the correct classification" under the common law test); *id.* at 286 (statement of James C. Pyles).

289. See, e.g., *id.* at 98-99 (1995) (statement of Raymond Peter Kane) (describing penalties assessed by the IRS for misclassification); *id.* at 84 (statement of Senator Don Nickles) (observing that the "horror stories surrounding this issue are numerous and disturbing").

290. One commentator maintained that "[f]ake independent contractor scams are rampant throughout the low-wage work force sectors," including "agriculture, building services, clerical and support services, food services and catering, the garment industry, and health care." Jonathan P. Hiatt, *Policy Issues Concerning the Contingent Work Force*, 52 WASH. & LEE L. REV. 739, 749-50 (1995). See also Middleton, *supra* note 279, at 569.

291. See 1995 *Small Business Hearing*, *supra* note 288, at 261 (Coalition for Fair Worker Classification, *Projection of the Loss in Federal Tax Revenues Due to Misclassification of Workers*) (noting that there are "relatively few controls to ensure compliance" and that past IRS studies have shown that independent contractors "are more likely to underreport income and/or overstate expenses").

292. Act of 1978, Pub. L. No. 95-600, § 530, 92 Stat. 2885.

293. *Id.* § 530(a)(1)(b), 92 Stat. 2885.

294. *Id.* §§ 530(a)(2)(A)-(C), 92 Stat. 2885.

295. *Id.* § 530(b), 92 Stat. 2886. See also 1995 *Small Business Hearing*, *supra* note 288, at

changes were made to IRS enforcement procedures in the Small Business Job Protection Act of 1996, including a provision placing the burden of proof on the government where the taxpayer establishes a *prima facie* case that the classification decision was reasonable.²⁹⁶ However, the basic characteristics of section 530 remain intact.

At the same time, however, Congress has been considering proposals to redefine the standards for independent contractor classification decisions. The purported justification is to clarify the existing uncertainties and eliminate the unfairness of penalizing employers who in good faith, but mistakenly, treat their work force as independent contractors.²⁹⁷ However, some commentators have expressed concern that the proposals would encourage employers to reclassify common law employees to independent contractor status.²⁹⁸ The lure of avoiding employment taxes and eliminating benefit obligations²⁹⁹ might be sufficient to overcome any problems that independent contractor arrangements might otherwise entail.³⁰⁰ The reclassified employees and corresponding government

286 (1995) (statement of James C. Pyles). To circumvent this restriction, the IRS issued a training manual on worker classification standards. *See supra* note 287.

296. Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1122(a), 110 Stat. 1755.

297. *See, e.g.,* 1995 *Small Business Hearing*, *supra* note 288, at 131-32 (statement of John S. Satagaj) (supporting the proposed Independent Contractor Tax Simplification Act of 1995, creating a three-part test to determine independent contractor status); *id.* at 139-41 (statement of Bennie L. Thayer). *See also* *Senate Bill Would Clarify Definition of Contractor*, WALL ST. J., March 14, 1996, at A14 (noting Senator Christopher Bond's concern that "[t]oo many small-business owners 'get their tutorial on the subtleties of this issue during an IRS audit'"). Independent contractor legislation was also introduced in the 105th Congress. *See, e.g.,* S. 460, 105th Cong. (1997); H.R. 771, 105th Cong. (1997).

298. *See* 1995 *Small Business Hearing*, *supra* note 288, at 287 (statement of James C. Pyles) (stating that the proposed legislation "may trigger massive reclassifications on an initial and continuing basis").

299. That lure is currently available under the existing system with its somewhat more restrictive standards for worker classification. In the words of one commentator, there are "financial incentives [which] employers enjoy for misclassifying employees through avoidance of benefit and worker compensation premiums, [as well as] a financial incentive by the tax system to engage in such unlawful misclassification." Hiatt, *supra* note 290, at 749. Loosening the classification standards would reduce the employer's risk of penalties in the event of a dispute with the IRS, thereby increasing the incentive to misclassify.

300. The financial benefits of an erroneous independent contractor classification must be weighed against "the threat of potentially ruinous assessment of taxes, interest and penalties." Gwen Thayer Handelman, *On Our Own: Strategies for Securing Health and Retirement Benefits in Contingent Employment*, 52 WASH. & LEE L. REV. 815, 836 (1995). The risk of detection from an IRS audit is part of this calculation. Additionally, however, the employer must exercise judgment in determining whether the nature of the work justifies the loss of control entailed in an independent contractor arrangement. A further concern is that contingent workers may be less qualified and loyal, as well as subject to higher turnover rates. *See* Kallstrom & Wellons, *supra*

tax collections would be adversely affected, and there would be a risk that any new IRS standard for employment tax purposes might find its way into classification decisions for other employment-related issues. The Clinton Administration criticized the proposal and raised the possibility of a veto of any legislation to ease limitations on reclassifying employees to independent contractor status.³⁰¹ While this may remove the threat for now, the idea could well resurface in the future.

Alternatively, some commentators have suggested that worker protection policies should lead to the replacement of the common law right of control test for determining independent contractor status with a more worker-oriented economic reality approach. The policy behind this alternative standard is to extend the protection available under various labor statutes to those who are functionally equivalent to traditional employees because of their comparable need for workplace protection.³⁰² The test was employed by the U.S. Supreme Court in *NLRB. v. Hearst Publications, Inc.*,³⁰³ in lieu of the common law right of control doctrine as the basis for identifying covered employees under the National Labor Relations Act ("NLRA"). More recently, the economic reality theory received support in the final report of the Dunlop Commission which recommended that:

Workers should be treated as independent contractors if they are truly independent entrepreneurs performing services for clients—*i.e.*, if they present themselves to the general public as an established business presence, have a number of clients, bear the economic risk of loss from their work, and the like. Workers who are economically dependent on the entity for whom they perform services generally should be treated as employees. Factors such as low wages, low skill levels, and having one or few employers should all militate against treatment as an independent contractor.³⁰⁴

However, to date the economic reality test has received very little legislative or judicial approval. The Supreme Court's decision in *Hearst Publications* was

note 194, at 6. However, the incentives to misclassify are often sufficient as evidenced by "[s]tudies performed by the IRS and GAO [that] have indicated that there is a significant segment of employers which may deliberately treat their employees as independent contractors." 1995 *Small Business Hearing*, *supra* note 288, at 282 (Coalition for Fair Worker Classification, *Projection of the Loss in Federal Tax Revenues Due to Misclassification of Workers*).

301. See Frank A. Aukofer, *Klecza Optimistic on Tax-Cut Legislation: Congress Starts Haggling Over Details This Week*, MILWAUKEE J. SENT., July 7, 1997; Greg Hitt, *Clinton, Republicans Fault Tax Package*, WALL ST. J., June 11, 1997, at A2.

302. See Dau-Schmidt, *supra* note 268, at 884; Hiatt, *supra* note 290, at 749-51. The lack of clear standards, however, may result in judges being able to interpret the economic realities standard to achieve virtually any result. See Middleton, *supra* note 279, at 577-78.

303. 322 U.S. 111 (1944).

304. DUNLOP COMMISSION REPORT, *supra* note 279, at 38-39.

reversed by Congress in the Taft-Hartley Act, ("Taft-Hartley")³⁰⁵ thereby returning the standard under the NLRA to the common law right of control standard in its definition of statutorily covered employees. The Supreme Court, moreover, has indicated that the definition of an employee should normally encompass the common law standard, unless there is some legislative indication that an alternative approach is required.³⁰⁶ This was found to be the case for the Fair Labor Standards Act ("FLSA"),³⁰⁷ but other labor statutes have not been treated in the same fashion. Overall, proponents of an economic reality approach to worker protection legislation, including statutes regulating workplace benefits, have very little legal support for their position.

In the final analysis, however, the most promising area for assistance to contingent employees deprived of workplace benefits may lie in affording them some of the same advantages in seeking benefits independently that employers now have. Deductibility of health insurance premiums is one example. Under current tax law, the cost of health insurance employers provide for their employees is fully deductible,³⁰⁸ and the value of the health insurance is not included as income to the employee.³⁰⁹ Until recent legislation, those classified as self-employed, in contrast, were only afforded a deductibility limit of 25% subject to yearly re-enactment of this authorization by Congress.³¹⁰ This was initially raised to 30% and made permanent,³¹¹ with deductibility limits now scheduled to increase to 100% in 2003.³¹² A better solution is to make all

305. Ch. 120, sec. 101, § 2(3), 61 Stat. 136, 137-38 (1947) (codified at 29 U.S.C. § 152(3) (1994)) (excluding coverage under the Act for those "having the status of an independent contractor").

306. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989).

307. The broader definition of covered employees under the FLSA has been based upon its inclusion of language applying to those who "suffer or permit to work," a standard which "stretches the meaning of 'employee' to some parties who might not qualify under a strict application of agency law principles." *Nationwide Mut. Ins. Co.*, 503 U.S. at 326. See also *Goldberg v. Whitaker House Coop.*, 366 U.S. 28, 33 (1961); *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

308. The amount paid for such insurance is considered an ordinary and necessary business expense. See I.R.C. § 162(a) (1994).

309. See *id.* §§ 105(b), 106 (1994 & Supp. II 1996).

310. Eligibility for the deduction requires that the individual meet the definition of being self-employed with income from self-employment. See *id.* § 401(c)(1) (1994). This allowance was added by the Self-Employed Individuals Tax Retirement Act of 1962 (Keogh-Smathers Act), Pub. L. No. 87-792, 76 Stat. 809. The requirement of yearly re-enactment posed a risk to the self-employed who were eligible for the deduction that the benefit might be lost. See 1995 *Small Business Hearing*, *supra* note 288, at 145 (National Association for the Self-Employed, *Estimating the Number of Persons Affected by the Elimination of the 25 Percent Income Tax Deduction for Health Insurance Premiums*).

311. Business interests firmly supported the change. See 1995 *Small Business Hearing*, *supra* note 288, at 120 (statement of John P. Galles); *id.* at 136 (statement of Bennie L. Thayer).

312. The Internal Revenue Code had authorized the self-employed to deduct 45% of their

contingent employees immediately eligible to receive the same full deductibility for health insurance costs applicable to those in traditional employee relationships.³¹³ Such a policy would serve to soften the impact of the high cost of health insurance purchased separately by contingent employees excluded from employer benefit programs.³¹⁴

Tax deductibility, however, is only one of the advantages company-provided health insurance now enjoys. The other is the employer's ability to secure favorable group rates from insurance companies, an opportunity not available to individuals purchasing insurance on their own. Here, however, a solution to the problem does not necessarily require government action. As an alternative, private sector entities could negotiate on behalf of their members for favorable group insurance rates. This is available to contingent employees who belong to professional organizations that offer insurance at favorable group rates,³¹⁵ but there is an obvious gap in the marketplace for others lacking this option. Currently a private sector organization, Working Today, has been attempting to meet the insurance needs of contingent workers by offering such programs to

health insurance costs for tax years 1998 and 1999, rising to 50% in 2000, and increasing gradually to 100% in 2007. I.R.C. § 162(l)(1) (1994 & Supp. II 1996). The budget bill signed by the President in October 1998 increased the 1999 deductibility limit to 60%, with full deductibility in 2003. *See supra* note 58. Bringing forward the date for full deductibility of health insurance costs for the self-employed remains an issue in the political process, and has been considered as part of the Republican legislative proposals on Health Maintenance Organization regulation. *See* Lizette Alvarez, *After Polling, G.O.P. Offers a Patients' Bill*, N. Y. TIMES, July 16, 1998, at A1; Laurie McGinley, *Senate GOP Comes Up With a Proposal to Protect Consumers in Managed Care*, WALL ST. J., July 16, 1998, at A20.

313. One commentator maintains:

The cost of health insurance and medically necessary care should be fully deductible from taxed income for all workers. Adequate medical attention to maintain one's fitness for employment ought to be recognized as a cost that offsets earnings from labor equally as maintenance expenses on a manufacturer's capital equipment or the utility bills of a shopkeeper offset their business income.

Handelman, *supra* note 300, at 843. *See also* 1995 *Small Business Hearing*, *supra* note 288, at 120-21 (statement of John P. Galles) ("[I]t is a telling commentary on the equity of our tax law that Donald Trump can fully deduct the cost of his health care because his multi-billion dollar enterprise happens to be a corporation, yet everyday small business owners . . . can only deduct 30 percent of their health care costs."); *id.* at 136-37 (statement of Bennie L. Thayer).

314. Full deductibility would effectively reduce the cost of insurance by the taxpayers tax rate. For lower paid workers, this would mean a cost reduction of either 15% or 28%, with higher paid workers achieving greater savings. *See* I.R.C. § 1 (1994 & Supp. II 1996).

315. While organizations such as the American Bar Association may offer a wide range of insurance products at favorable group rates, this is not true in all professions. Performers, in particular, may miss out on coverage entirely if they are employed by small companies without benefit programs, and do not meet the minimum earnings figure set by the unions. *See* Milt Freudenheim, *Got the Gig, But Where's the Health Insurance?*, N.Y. TIMES, June 26, 1997, at B1.

those unable to qualify for other group coverage.³¹⁶ Although it is still in its early formative stages, Working Today is clearly pursuing the right goals at the right time.

Tax policies should also provide equivalence in the treatment of income diverted for retirement purposes. Where employees have company-provided pension plans, significant tax advantages are available. These include allowing employer contributions to be deducted immediately,³¹⁷ permitting investment assets to accumulate tax free prior to distribution,³¹⁸ and deferring the payment of taxes by the recipient until pension benefits are actually received.³¹⁹ There is no reason why a contingent worker from an employee leasing firm should not be able to benefit from the same tax inducements for retirement planning. If neither the leasing firm nor the recipient firm allow the contingent worker to participate in a pension program, with its tax deferral consequences, he should be able to do it on his own. To an extent this does occur if the individual is self-employed and establishes his own deferred compensation program,³²⁰ but not every worker fits within this category. Temporary agency employees who are paid on an hourly basis by a staffing company, for example, cannot claim the benefit of income tax deferral under the provisions applicable to retirement programs for the self-employed.³²¹ The tax laws do permit such individuals to set up IRAs, but the \$2000 per year IRA limit is well below the amount of tax deferral available to traditional employees provided with company-sponsored pension plans.³²²

316. Working Today seeks to both provide services such as group insurance to its contingent employee membership, as well as serve as a work force lobby. See Bob Herbert, *Strength in Numbers*, N. Y. TIMES, Nov. 3, 1995, at A29; Stuart Silverstein, *New Group Provides Benefits, Political Voices for U.S. Workers*, L.A. TIMES, Dec. 1, 1996, at D5. See generally *Working Today* (visited Dec. 9, 1998) <<http://www.workingtoday.org/>>. Another suggested private sector initiative would be greater union involvement in the contingent employment sector of the economy, but there are relatively few examples illustrating such an effort due to the difficulties encountered by unions in trying to organize non-traditional workers. See Middleton, *supra* note 279, at 589-99. Arguably, non-profit, private-sector buying cooperatives should be established to make available health and retirement programs to everyone, regardless of their employment status. See Cantoni, *supra* note 7, at A14.

317. See I.R.C. § 404 (1994 & Supp. II 1996).

318. See *id.* § 501.

319. See *id.* § 402.

320. Self-employed individuals became eligible for tax-favored pension plans with the passage of the Self-Employed Individuals Tax Retirement Act of 1962 which redefined the term "employee" in I.R.C. § 401(c)(1) (1994) to include the self-employed. Self-Employed Individuals Tax Retirement Act of 1962 (Keogh-Smathers Act), Pub. L. No. 87-792, 76 Stat. 809.

321. Such individuals do not meet the definition of a self-employed individual as contained in I.R.C. § 401(c) (1994), nor do they have "net earnings from self-employment" as described in I.R.C. § 1402(a) (West Supp. 1998).

322. Internal Revenue Code § 408(a)(1) (1994 & Supp. II 1996) limits IRA contributions to \$2000 per year. In comparison, benefit limits for employer-provided pension plans seeking

CONCLUSION

The forces that have produced the increasing employer utilization of contingent workers are still present in the American economy. Companies continue to desire flexibility to expand and contract their work force to meet changing production needs. They are also under increasing global competitive pressure to reduce costs. The contingent employment model is well suited to solving these problems. Therefore, it is inevitable that the contingent employment system will remain a significant component of the American labor market, with an obvious potential for growth.

Although contingent employment arrangements are likely to persist, this does not mean that the legal system must remain unresponsive to the special problems contingent employment imposes on workers within the category. Those problems, in particular, include the lack of access to employer-provided workplace benefits. Either we must rethink the existing system which permits employers to create contingent employment arrangements, or we must lessen the burden imposed on contingent employees, either by mandating benefit eligibility for them or by providing some form of assistance to those who make the effort to secure benefits on their own. Failure to do so only serves to victimize a segment of the work force especially in need of public policy protection.

One approach to the question is to leave the issue unregulated by government. This allows the employer to structure the workplace in a manner deemed most economically efficient. The marketplace will then determine whether or not contingent employees receive benefits. To a large extent, that is the current system, and it has resulted in producing an increasing number of workers without access to workplace benefits.

The opposite extreme solution would simply bar discrimination in benefit participation based upon the classification of the worker providing services. Under such a system, contingent employees of all kinds would have the benefit of equal treatment in all aspects of benefit program administration. Accommodations would very likely have to be made to account for the fact that some workers have less than full-time assignments, while others may work full-time but only on a temporary basis. Pro rata apportioning of benefits is an acceptable solution to this problem, with waivers of any benefit participation requirements in cases where the worker receives equivalent benefits elsewhere, such as from the employment agency or leasing firm which supplied him to the employer. While potentially costly, such an approach would redress the existing inequalities, but in today's political climate there is little likelihood that any such regulation could be enacted.

Even under the largely unregulated system currently employed, some restrictions exist on the employer's freedom to structure benefit programs. The leased employee restrictions, for example, impose tax consequences on

employers who create a largely contingent work force which circumvents rules against top-heavy pension plans.³²³ Additionally, section 510 of ERISA provides some protection to existing employees with benefits who are 'restructured' for the specific purpose of interfering with their benefit program participation.³²⁴ Courts may also look carefully at ambiguous benefit plan language when contingent workers are denied the right to participate in the company's benefit program.³²⁵ Finally, barring legislative change, legal standards prevent employers from misclassifying workers into the contingent category in order to avoid any obligation to pay employment taxes or allow the affected workers to participate in company-sponsored employee benefit programs.³²⁶ Nevertheless, these controls have not deterred employers from taking advantage of the wide discretion they are afforded in deciding upon benefit program eligibility.

Although directly confronting company policies that prohibit contingent employees from participating in company benefit programs is certainly one option (if not the preferred remedy) for solving the contingent employee benefits problem, alternative approaches are also available. Indeed, given the current political climate, there appears to be little prospect that Congress will take any new steps to bar companies from dealing with benefit programs largely as they see fit. Thus, it seems likely that most contingent workers will continue to be excluded from employer benefit programs, but this does not mean that legislative attention to this issue is unnecessary.

What contingent employees require at a minimum is equal access to the financial advantages available to employers who create employee benefit programs. Tax laws currently favor employers who provide benefits, while failing to recognize the increasing movement in the labor market toward self-employed and contingent workers. Secondly, contingent workers need some mechanism which would permit them to secure the same group benefit rates employers now enjoy. This is not necessarily a problem for contingent workers who have the option of joining professional organizations that already provide benefits at group rates, but those who are not in this category are in need of a private sector solutions to their problem. The efforts of organizations such as Working Today illustrate how this can be accomplished.

Even with changes of the character recommended here, contingent workers will still remain a disadvantaged component of the work force due to their insecure status. But at the very least they should not be excluded from the opportunity to participate in the kinds of workplace benefit programs that have become critical in contemporary life on terms comparable to those available to traditional employees. This would represent an important first step in restructuring the benefits system to accommodate the restructured labor market environment now characterizing the American economy.

323. See *supra* notes 269-78 and accompanying text.

324. See *supra* notes 219-57 and accompanying text.

325. See *supra* notes 79-122 and accompanying text.

326. See *supra* notes 279-301 and accompanying text.

SUCCESSFUL RATIONAL BASIS CLAIMS IN THE SUPREME COURT FROM THE 1971 TERM THROUGH *ROMER V. EVANS*

ROBERT C. FARRELL*

The Supreme Court's 1996 decision in *Romer v. Evans*¹ was significant in that it was the first case in which the Court found unconstitutional a law that disadvantaged persons on the basis of their sexual orientation.² As remarkable as was the result in the case, equally remarkable was the manner in which the Court reached its result. The Court chose not to address the issue of heightened scrutiny for the challenged classification,³ even though the Colorado Supreme Court had used heightened scrutiny in its decision below.⁴ Instead, the Court ignored questions about the appropriate level of scrutiny and invalidated the Colorado rule on the basis of rationality review,⁵ a review that is ordinarily deferential and minimal. Justice Scalia, dissenting, was of the view that the majority's decision in *Romer* was without precedent.⁶ This is not true. Although the decision in *Romer* was not typical of rational basis decisions, it was hardly unprecedented.

This Article addresses successful rational basis claims under the Equal Protection Clause in the Supreme Court. These cases are sufficiently rare to stand out as unusual, but they do exist. In the past twenty-five years, the Court has decided ten such cases, while during the same time period, it has rejected rational basis arguments on one hundred occasions. This ratio of successful to unsuccessful claims is not surprising given that rational basis review is considered an extremely deferential standard. This Article examines the small number of successful rational basis claims in search of common and predictable patterns of selection, reasoning, and use as precedent. Unfortunately, the Court's selection of cases to which it will give a heightened, less deferential rationality review follows no obvious pattern. The Court never explains why it has selected a particular case for heightened rationality. The Court's analysis differs from case to case. None of these cases has had a significant precedential impact on

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1. 517 U.S. 620 (1996).

2. *Id.* at 635.

3. *Id.* at 626 ("We granted certiorari and now affirm the judgment, but on a rationale different from that adopted by the State Supreme Court.").

4. *Evans v. Romer*, 854 P.2d 1270, 1282 (Colo. 1993) (holding that Amendment 2 was subject to strict scrutiny because it infringed the fundamental right of gays and lesbians to participate in the political process).

5. *Romer*, 517 U.S. at 631-32.

6. *Id.* at 644 (Scalia, J., dissenting) ("The foregoing suffices to establish what the Court's failure to cite any case remotely on point would lead one to suspect: No principle set forth in the Constitution, nor even any imagined by this Court in the past 200 years, prohibits what Colorado has done here.").

subsequent cases. For the most part, once the case has been decided, the Court ignores it.

This results effectively in two sets of rationality cases, one deferential and one heightened, operating as if in parallel universes with no connection between them. Although the two lines of cases appear to be in conflict, Court opinions on one side ignore or minimize precedents going the other way. The Court has not overruled any of the successful rational basis cases discussed in this Article, yet they appear to conflict with the majority of cases that adopt the far more common deferential attitude. The two lines of cases stand in relation to each other as "matter and anti-matter," "two contradictory propositions [that] cannot live comfortably together: in the end one must swallow the other up."⁷

This Article takes as its starting and ending points two well-known, often-cited works from the rationality literature. It begins with Gerald Gunther's widely-cited article in the *Harvard Law Review* in which he identified the Court's use, during the 1971 Term, of a heightened rationality review with "bite."⁸ It ends with *Romer*, a case in which the Court resuscitated from a presumed interment the use of heightened rationality.

I. THE EQUAL PROTECTION FRAMEWORK

At least since Joseph Tussman and Jacobus tenBroek's influential article,⁹ it has been clear that the idea of equality that is embodied in the Equal Protection Clause¹⁰ imposes a limitation on government's ability to classify. All laws classify,¹¹ and equal protection requires that such classifications have a certain relation to the purpose of a law. The rule is usually stated as requiring that a classification be rationally related to legitimate government purposes.¹² When

7. GRANT GILMORE, *THE DEATH OF CONTRACT* 68 (1995). Gilmore's reference to "matter and anti-matter" pertained to the doctrine of consideration in contract law. The matter and anti-matter were bargain and reliance as alternative theories for making promises enforceable.

8. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For A Newer Equal Protection*, 86 HARV. L. REV. 1, 12 (1972).

9. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

10. U.S. CONST. amend. XIV, § 1.

11. See *Toll v. Moreno*, 458 U.S. 1, 39 (1982) (Rehnquist, J., dissenting) ("All laws classify, and, unremarkably, the characteristics that distinguish the classes so created have been judged relevant by the legislators responsible for the enactment."); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271-72 (1979) ("Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law."); Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1068 (1979) ("Every time an agency of government formulates a rule—in particular every time it enacts a law—it classifies.").

12. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973) ("A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the

the Court applies this standard, it is ordinarily extremely deferential to the democratically elected branches of government. The Court uses several techniques to demonstrate this deferential attitude. With regard to the “legitimate purpose” that the legal classification is supposed to serve, the Court does not insist that the defenders of the law identify the actual purpose of the law, but rather, only a conceivable, and sometimes hypothesized, purpose.¹³ With regard to the required nexus—the rational relationship between the classification and purpose—the Court does not insist that such a connection exist in fact, but only that the legislature could reasonably have believed that there was such a connection.¹⁴ The fact that the legislature is wrong about the relationship between classification and purpose does not invalidate the challenged statute.¹⁵ When the Court is using these techniques of deference, it is obvious that it need not consider evidence either of purpose or of connection. This technique of rational basis review can be so deferential as to amount to no review at all. Any statute could survive a review that freely hypothesizes purpose and does not insist that there be any connection in fact between a classification and such a hypothesized purpose.

With regard to certain classifications, most notably race¹⁶ and gender,¹⁷ the

application of the traditional standard of review, which requires only that the State’s system be shown to bear some rational relationship to legitimate state purposes.”).

13. See, e.g., *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).

[T]hose attacking the rationality of the legislative classification have the burden ‘to negative every conceivable basis which might support it.’ Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.

Id. (internal quotation marks omitted in original) (citations omitted).

14. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) (“Whether *in fact* the Act will promote more environmentally desirable milk packaging is not the question: the Equal Protection Clause is satisfied by our conclusion that the Minnesota Legislature *could rationally have decided* that its ban on plastic nonreturnable milk jugs might foster greater use of environmentally desirable alternatives.” (emphasis in original)).

15. See *id.* at 464 (“Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation merely by tendering evidence in court that the legislature was mistaken.”).

16. See, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984).

A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race. Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category. Such classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be ‘necessary . . . to the accomplishment’ of their legitimate purpose.

Id. (footnote and citations omitted).

17. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“To withstand constitutional

Court has adopted a formal level of heightened scrutiny. This Article is concerned with a different set of cases—those in which the Court, without adopting heightened scrutiny on a formal basis, has in fact applied a heightened level of scrutiny to the traditional standard of rationality. In these rationality cases, the Court uses techniques quite different from those it uses when being deferential. First, the Court looks for evidence of the actual purpose of a law.¹⁸ The Court carefully evaluates this purpose to determine whether it is permissible. Frequently, the Court will invalidate the law because the purpose turns out to be impermissible.¹⁹ In addition to this close review of legislative purpose, another technique of heightened rationality is to look to the record²⁰ to see if there is in fact some real correlation between classification and purpose. Under this sort of review, evidence from the record, rather than hypothesized information, is quite important. If the legislature's factual assumptions about the nexus between classification and purpose are incorrect, then the standard has not been satisfied.

II. GUNTHER'S MODEL FOR A NEWER EQUAL PROTECTION IN 1972

Twenty-five years ago, Gerald Gunther published in the *Harvard Law Review* an influential article in which he reviewed the Supreme Court's 1971 Term.²¹ This is the article in which Gunther originated the now famous mantra, "'strict' in theory and fatal in fact."²² Gunther wrote his article on the 1971 Term at a time when the Court was making a transition in leadership from Chief Justice Warren to Chief Justice Burger. A number of Court watchers were purporting to find major differences between the Warren and Burger Courts.²³ Gunther, however, found that such changes were more marginal, evidenced not so much by retreats from decisions of the Warren Court but by refusals to extend those decisions.²⁴ Gunther's article used the equal protection decisions of the Court's 1971 Term as evidence of this moderate change of direction.

The Warren Court's equal protection analysis, according to Gunther, had "embraced a rigid two-tier attitude. Some situations evoked the aggressive 'new' equal protection, with scrutiny that was 'strict' in theory and fatal in fact; in other contexts, the deferential 'old' equal protection reigned, with minimal scrutiny in theory and virtually none in fact."²⁵ Gunther was of the view that, contrary to the fears of the Burger Court's critics, the Court during the 1971 Term did not abandon the interventionist new equal protection and retreat to an extreme

challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

18. See, e.g., *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

19. See, e.g., *id.*

20. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985).

21. Gunther, *supra* note 8.

22. *Id.* at 8.

23. See *id.* at 2.

24. *Id.*

25. *Id.* at 8.

deference in all cases. In fact, during the 1971 Term, equal protection arguments prevailed far more frequently than they failed.²⁶ What is perhaps most surprising is that a substantial number of these arguments were successful even while the Court purported to use minimal scrutiny. Gunther's article identified seven cases from the 1971 Term in which equal protection arguments were successful even though the Court made no mention of the strict scrutiny formula.²⁷ Following up on the metaphor that traditional minimal scrutiny had been "toothless,"²⁸ Gunther identified a new-found "bite" in the Court's minimal scrutiny decisions and suggested that the Supreme Court would be willing to use the Equal Protection Clause as an "interventionist tool" without resort to strict scrutiny.²⁹

Although Gunther had identified seven successful rationality cases, he determined at the outset that one of the seven cases was not appropriately included in a discussion of equal protection cases.³⁰ In *Stanley v. Illinois*,³¹ the Court had reviewed an Illinois statute under which children of unwed fathers became wards of the state upon the death of the mother. As Gunther pointed out, most of the Court's opinion involved a procedural due process issue—the lack of a hearing at which the father could prove his competence and care.³² However, the Court was constrained from deciding the due process issue because the plaintiff had not raised it below.³³ The Court was thus forced to transform a due process issue into a comparative equal protection claim. The problem was not in the mere failure to provide the father a hearing, but the failure to provide the hearing while extending it to other parents. Although this reasoning made the father's claim technically an equal protection claim, Gunther determined that the case was only marginally concerned with equal protection and thus should be omitted from his discussion.³⁴

This left Gunther with six minimal scrutiny cases in which equal protection was a central issue. With the benefit of twenty-five years of additional Supreme Court cases that were not available to Gunther in 1972, three more of his seven cases, involving gender, illegitimacy, and reproductive rights, should also be set aside. These three cases, which in 1972 looked to Gunther as involving minimal scrutiny with bite, the Court would later explain as having involved a formal level of heightened scrutiny after all.

In the first of these cases, *Reed v. Reed*,³⁵ the Court invalidated an Idaho

26. See *id.* at 11-12 (indicating that of the fifteen basic equal protection decisions of the 1971 Term, the constitutional challenge was rejected in only four cases, succeeded in ten cases, and in one case the constitutional claim was remanded).

27. *Id.* at 18.

28. *Id.* at 18-19.

29. *Id.* at 12.

30. *Id.* at 25.

31. 405 U.S. 645 (1972).

32. Gunther, *supra* note 8, at 25.

33. *Id.* See also *Stanley*, 405 U.S. at 658.

34. Gunther, *supra* note 8, at 25.

35. 404 U.S. 71 (1971).

statute that preferred males over females in the selection of a probate administrator.³⁶ The Court explained that the equal protection issue was “whether a difference in the sex of the competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of [the statute].”³⁷ The Court concluded that it did not since it was arbitrary to prefer men over women merely to avoid hearings on the merits.³⁸

Even in 1972, Gunther was suspicious that, notwithstanding its language, *Reed* was not really a minimal scrutiny case. The result in the case, according to Gunther, was difficult to explain “without an assumption that some special sensitivity to sex as a classifying factor entered into the analysis.”³⁹ Gunther’s suspicions were validated four years later, in 1976, in *Craig v. Boren*.⁴⁰ In that case, the Court created a new, formal, intermediate, heightened scrutiny for gender classifications—that the classification be substantially related to an important governmental purpose.⁴¹ The Court claimed that previous cases had established the formula.⁴² One of those “previous cases” that the Court identified was *Reed*.⁴³ Justice Rehnquist, dissenting in *Craig*, insisted that the new formula had been pulled from “thin air.”⁴⁴ In the majority’s revisionist history, however, *Reed* had already established a heightened scrutiny for gender classifications in 1971. Thus, as a result of the Court’s historical analysis in *Craig*, *Reed* is better viewed as the beginning of the road to intermediate scrutiny, rather than as an example of heightened rationality.

The same can be said for another of Gunther’s seven cases, *Weber v. Aetna Casualty & Surety Co.*⁴⁵ In that case, the Court invalidated a Louisiana statute that prohibited unacknowledged illegitimate children from recovering workers’ compensation benefits for the death of their father.⁴⁶ As Gunther noted, the level of review that the Court used was unclear.⁴⁷ On the one hand, the Court cited as relevant precedent two of its earlier illegitimacy cases for the propositions that “rational relationship to . . . legitimate state purpose”⁴⁸ and “possible rational basis”⁴⁹ are the appropriate standards with which to review illegitimacy

36. *Id.* at 76-77.

37. *Id.* at 76.

38. *Id.*

39. Gunther, *supra* note 8, at 34.

40. 429 U.S. 190 (1976).

41. *Id.* at 197.

42. *Id.*

43. *Id.* at 197-98.

44. *Id.* at 220 (Rehnquist, J., dissenting).

45. 406 U.S. 164 (1972).

46. *Id.* at 175.

47. Gunther, *supra* note 8, at 31.

48. *Weber*, 406 U.S. at 172 (citing, *inter alia*, *Morey v. Doud*, 354 U.S. 457 (1957)).

49. *Id.* at 173 (quoting *Glonn v. American Guarantee & Liab. Ins. Co.*, 391 U.S. 73, 75 (1968)).

classifications. On the other hand, the Court identified as the “essential inquiry” a dual set of questions: “What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?”⁵⁰ These dual questions are not the language of minimal scrutiny. Further, the Court rejected the justification that a legitimate child is more likely to have a closer relationship with the father than an illegitimate child as “not compelling”⁵¹ and stated that the distinction between legitimate and illegitimate bore “no significant relationship” to the state interest in minimizing problems of proof.⁵² Again, this is not the language of minimal scrutiny.

Even in 1972, then, Gunther identified the *Weber* case and illegitimacy classifications in general as not clearly involving minimal scrutiny. The Court wrestled with this issue—the appropriate level of review for illegitimacy classifications—for another sixteen years before adopting a clear standard. During the intervening period, the Court frequently used a hybrid standard that included some of the language of minimal scrutiny and some of the language of heightened scrutiny.⁵³ Finally, in *Clark v. Jeter*⁵⁴ in 1988, a majority of the Court formally adopted for illegitimacy the same intermediate standard it had adopted for gender classifications in 1976 in *Craig v. Boren*—the classification must be substantially related to an important governmental interest.⁵⁵ In doing so, the Court once again conveniently revised its earlier case law by citing *Weber* as an example of a case that had applied that intermediate standard.⁵⁶ That *Craig v. Boren* had not explicitly created the intermediate standard until four years after *Weber* did not seem to be important to the Court. In any case, as a result of many years of case law unavailable to Professor Gunther when he wrote his article, *Weber* should also be set aside since it no longer appears to be a case of heightened rationality.

That reduces Gunther’s seven cases to four; however, one more needs to be set aside. Gunther discussed *Eisenstadt v. Baird*,⁵⁷ in which the Court invalidated a Massachusetts statute that criminalized the distribution of contraceptives to unmarried persons.⁵⁸ The Court identified the appropriate equal protection

50. *Id.*

51. *Id.* at 173-74.

52. *Id.* at 175.

53. See *infra* notes 135-38 and accompanying text.

54. 486 U.S. 456 (1988).

55. *Id.* at 461 (“Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy. To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective.” (citations omitted)).

56. *Id.* After stating the intermediate standard, the Court said: “Consequently we have invalidated classifications that burden illegitimate children for the sake of punishing the illicit relations of their parents, because ‘visiting this condemnation on the head of an infant is illogical and unjust.’” *Id.* (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)).

57. 405 U.S. 438 (1972).

58. *Id.* at 443.

standard as “whether there is some ground of difference that rationally explains the different treatment accorded married and unmarried persons.”⁵⁹ In a footnote, the Court explained that if it were to determine that the contraception statute “impinges upon fundamental freedoms under *Griswold*, the statutory classification would have to be not merely rationally related to a valid public purpose but necessary to the achievement of a compelling state interest.”⁶⁰ However, the Court did not believe that it needed to test the statute under strict scrutiny since “the law fails to satisfy even the more lenient equal protection standard.”⁶¹ The Court was unwilling to credit the asserted statutory purposes of deterring fornication and promoting health.⁶² The one statutory aim that the Court was willing to credit—prohibiting contraception—was not permitted under *Griswold v. Connecticut*.⁶³

Gunther’s commentary on *Eisenstadt* was that the Court’s actual scrutiny of the statute was far more intense than its articulated standard of review.⁶⁴ Gunther’s explanation for the deviation was “the considerable pressure to strain for grounds of invalidation which would avoid the *Griswold v. Connecticut* issue.”⁶⁵ If avoidance of *Griswold* was the intent, the Court was not successful. Even within the *Eisenstadt* opinion, the Court had cited *Griswold* as establishing a marital right of privacy.⁶⁶ However, the Court continued,

The marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.⁶⁷

One year later, in *Roe v. Wade*,⁶⁸ we would find out that the effect of this language in *Eisenstadt* was substantial. *Eisenstadt* stripped *Griswold* of its underpinning of privacy as subsisting within the marital union, extended the right to use contraceptives to unmarried persons, and most importantly, created a generalized right of privacy that included “the decision whether to bear or beget a child.” As *Roe* would explain, this right of privacy would include the right to terminate a pregnancy.⁶⁹ Thus, if as Gunther suggested, the Court in *Eisenstadt* was attempting to avoid confronting the privacy implications of *Griswold*, it

59. *Id.* at 447.

60. *Id.* at 447 n.7 (referring to *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

61. *Id.*

62. *Id.* at 448-50.

63. *Id.* at 452-53.

64. Gunther, *supra* note 8, at 34.

65. *Id.* (footnotes omitted).

66. *Eisenstadt*, 405 U.S. at 453.

67. *Id.*

68. 410 U.S. 113 (1973).

69. *Id.* at 153.

failed to do so. With the benefit of *Roe* and its progeny, it is clear that *Eisenstadt* was a fundamental rights case in minimal scrutiny clothing. It should also be set aside in this discussion of heightened rationality.

This leaves three of Gunther's seven heightened rationality cases from the 1971 Term. The first of these was *James v. Strange*,⁷⁰ where the Court considered a Kansas recoupment statute under which the state could recover the expenses it had incurred while providing legal counsel to indigent criminal defendants. The district court had found the statute to be unconstitutional⁷¹ since it was "an impermissible burden on the right to counsel established in *Gideon v. Wainwright*."⁷² Although it was clear that Kansas had not denied the right to counsel in the strict sense,⁷³ it was at least arguable that the obligation later to pay for the counsel that had been provided might deter the exercise of the right. If the Court had decided this issue, it would have had to determine the limits of *Gideon* and to some extent would have to explicate the state's obligation "to remove financial barriers to indigents embroiled in the criminal process."⁷⁴

The Court chose a simpler method of invalidating the statute. The debt of the indigent defendant who had been provided with counsel by the state was not treated the same as the debt of all other civil judgment debtors.⁷⁵ Except for a homestead exemption, the indigent defendant was denied the benefit of the entire array of protective exemptions, including the protection from unrestricted garnishment.⁷⁶ This was significant because "[t]he debtor's wages are his sustenance, with which he supports himself and his family."⁷⁷ Although the recovery of costs was a legitimate state interest, the Equal Protection Clause required the state to explain why indigent defendants had been singled out for less favorable treatment than other debtors.⁷⁸ This the state had not done.

Gunther viewed *Strange* as a clear example of the Court's use of means scrutiny rather than ends scrutiny. The Court accepted the recovery of costs expended as a legitimate interest, but required that the state serve that interest in a more even-handed way. As Gunther explained, the state had provided no articulated ground for the difference in treatment and the Court was unwilling to hypothesize an explanation.⁷⁹ Gunther considered means scrutiny to be a narrower, preferred ground of decision and less of an intrusion on legislative

70. 407 U.S. 128 (1972).

71. *Strange v. James*, 323 F. Supp. 1230, 1234 (D. Kan. 1971).

72. *Strange*, 407 U.S. at 128-29 (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

73. *See id.* at 134.

74. Gunther, *supra* note 8, at 26-27.

75. *See Strange*, 407 U.S. at 135.

76. *See id.*

77. *Id.*

78. *See id.* at 140. The Court cited *Rinaldi v. Yeager*, 384 U.S. 305 (1966), for the proposition that the Equal Protection Clause "imposes a requirement of some rationality in the nature of the class singled out," a requirement the Court then said was lacking in *Strange*. *Strange*, 407 U.S. at 140 (quoting *Rinaldi*, 384 U.S. at 308-09).

79. Gunther, *supra* note 8, at 33.

prerogatives in the constitutional system of separation of powers.⁸⁰ Gunther also considered *Strange* to be a good example of the Court's "avoidance" technique.⁸¹ The Court wrote the opinion on narrow grounds in order to avoid wrestling with the difficult substantive issue of the extent to which the state had an affirmative obligation "to remove financial barriers to indigents embroiled in the criminal process."⁸²

The final two cases of Gunther's seven both involved equal protection challenges to civil commitment proceedings. In *Jackson v. Indiana*,⁸³ the Court reviewed the civil commitment of Theon Jackson, a man with very limited mental abilities⁸⁴ who had been charged with robbery. Before his case went to trial, the trial court had held a competency hearing at which it found that Jackson lacked adequate comprehension to make his defense.⁸⁵ The court then ordered Jackson committed to the Department of Mental Health until the Department certified that he was sane.⁸⁶

The civil commitment procedure for an individual, like Jackson, accused of a crime, differed from the two other sets of procedures that the state had adopted for the "feeble-minded" and for the "mentally ill."⁸⁷ In comparison to these two groups, it was easier for the state to have someone in Jackson's position committed initially and more difficult for him to obtain his release at a later time.⁸⁸ The Court found that these differences in procedure denied Jackson the

80. *Id.* at 26.

81. *Id.* at 26-27.

82. *Id.*

83. 406 U.S. 715 (1972)

84. *Id.* at 717 (describing the petitioner as "a mentally defective deaf mute with a mental level of a pre-school child. He cannot read, write, or otherwise communicate except through limited sign language.").

85. *Id.* at 717-19.

86. *Id.* at 719.

87. *Id.* at 721-23.

88. For someone like Jackson, against whom criminal charges were pending, for the initial commitment the state had to show only an inability to stand trial. On the other hand, in order for the state to obtain a commitment on the grounds that a person was mentally ill, the state had to make "a showing of mental illness and . . . a showing that the individual is in need of 'care, treatment, training or detention.'" *Id.* at 728 (quoting IND. CODE § 22-1201(1) (1971)). This appeared to the Court to mean that the state had to show that the person to be committed was dangerous. *Id.* As for commitment of an individual identified as "feeble-minded," the state had to show that the person was "unable properly to care for [himself]." *Id.* at 721.

With regard to release, a person like Jackson, who was committed while criminal charges were pending, would not be released until the Department of Mental Health certified that he was sane. *See id.* at 719. A person committed as "feeble-minded," on the other hand, would be eligible for release "when his condition 'justifies it,'" and a person committed as mentally ill could be released "when the 'superintendent or administrator shall discharge such person or (when) cured of such illness.'" *Id.* at 728-29 (quoting IND. CODE §§ 22-1814, 22-1223 (1971)).

equal protection of the laws.⁸⁹ In doing so, the Court cited its earlier decision in *Baxstrom v Herold*.⁹⁰ That case had involved a prisoner civilly committed at the end of his prison sentence without the jury trial that was made available in other civil commitment proceedings. The Court in *Baxstrom* held that the previous criminal conviction was insufficient to justify a lower level of protection against indefinite commitment.⁹¹ In comparison, then, Jackson's case was easier to resolve. If a criminal conviction was insufficient to treat one differently, the mere filing of charges was clearly insufficient.⁹² The Court in *Jackson* made no mention of heightened scrutiny in the case,⁹³ but its close comparison of the differing procedures for commitment, its reference to "the record"⁹⁴ as not supporting the state's factual premise, and its failure to hypothesize reasons for the different treatment, all suggest something more demanding than traditional rationality.⁹⁵

According to Gunther, the Court's reliance on equal protection in *Jackson* was another example of the "avoidance impulse," in that the Court was able to avoid "ventur[ing] into that uncertain realm of ultimate constitutional values."⁹⁶ The Court did not have to decide precisely what were the constitutional limits of the state's power to commit the mentally ill.

The last of Gunther's seven cases, *Humphrey v. Cady*,⁹⁷ also involved an

89. *Id.* at 730.

90. 383 U.S. 107 (1966).

91. *Id.* at 114-15.

92. *See Jackson*, 406 U.S. at 724.

93. In fact, the Court cited *Baxstrom*'s "no conceivable basis" standard. *Id.* (citing *Baxstrom*, 383 U.S. at 111-12).

94. The references to the record include the comment that it did not support the premise that petitioner's commitment was only temporary. *Id.* at 725. Further, the Court was "unable to say that, on the record before [it], Indiana could have civilly committed [Jackson] as mentally ill . . . or . . . as feeble-minded." *Id.* at 727.

95. The Court also found that the state's incarceration of Jackson violated the Due Process Clause, because "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Id.* at 738.

96. Gunther, *supra* note 8, at 28.

97. 405 U.S. 504 (1972). Gunther might have added an eighth case, *Lindsey v. Normet*, 405 U.S. 56 (1972), to his list of seven. Gunther did discuss *Lindsey* at some length, but as an example of the Burger Court's unwillingness to extend the Warren Court's discoveries of fundamental rights in the Constitution. Gunther, *supra* note 8, at 13-14. In *Lindsey*, the plaintiffs challenged Oregon's summary process statute for landlord/tenant disputes. Under the statute, landlord/tenant claims were decided very quickly and the issues to be litigated were sharply limited. Plaintiffs had sought heightened scrutiny of the statute on the ground that it infringed on the implied fundamental right to housing. The Court rejected that claim, explaining that "the Constitution does not provide judicial remedies for every social and economic ill." *Lindsey*, 405 U.S. at 74. Having rejected the claim for strict scrutiny, the Court then went on to uphold the summary process statute, since "the provisions for early trial and simplification of issues are closely related to [the] purpose" of "prompt as well as peaceful resolution of disputes over the right to possession of real property." *Id.* at 70.

equal protection issue arising out of a civil commitment hearing, this time under the Wisconsin 1971 Sex Crimes Act.⁹⁸ Under the terms of that statute, a person who had been convicted of a sex crime could be committed to the “sex deviate facility” in lieu of a criminal sentence.⁹⁹ At the end of what would have been the maximum term of the criminal sentence, the defendant’s term of commitment could be extended for up to five years if, at a hearing, the court found that the defendant’s discharge would be dangerous to the public.¹⁰⁰ The defendant Humphrey argued that this extension of his commitment after the expiration of his maximum prison sentence was equivalent to commitment under the Wisconsin Mental Health Act.¹⁰¹ Thus, he argued, he was entitled to a jury to determine whether he met the standards of commitment, just as would a person committed under the Mental Health Act.¹⁰² The District Court below had dismissed the claim without an evidentiary hearing because the claim lacked merit.¹⁰³ The Court of Appeals “refused to certify probable cause for an appeal.”¹⁰⁴

The Supreme Court reversed.¹⁰⁵ It once again cited *Baxstrom*, to the effect that “the State, having made a jury determination generally available to persons subject to commitment for compulsory treatment, could not, consistent with the Equal Protection Clause, arbitrarily withhold it from a few.”¹⁰⁶ The Court considered it appropriate to inquire what justifications might exist for treating those committed under the Sex Crimes Act differently from those committed

The Court explained that the appropriate standard is whether “the classification under attack is rationally related to . . . [a permissible] purpose.” *Id.* at 74.

However, the Court then applied this supposedly deferential standard to another part of the statute—the provision that required a party appealing a summary process action to post a bond of twice the amount of the rent expected to accrue pending the appellate decision. The Oregon Supreme Court had declared that the purpose of the double-bond requirement was to insure that the rent pending appeal was paid and to prevent frivolous appeals for the purpose of delay. *Id.* at 76 (quoting *Scales v. Spencer*, 424 P.2d 242, 243 (Or. 1967)). The Supreme Court found that the bond requirement, twice what was required of appellants in other civil actions, “bear[s] no reasonable relationship to any valid state objective and . . . arbitrarily discriminate[s] against tenants appealing in [summary process] actions.” *Id.* at 76-77. The requirement did not assure payment of rent pending appeal because the amount was not related to the rent already accrued or to the damage sustained by the landlord. It did not screen out frivolous claims because the ability to afford the double-bond was not connected to the substantive merits of the appeal. *Id.* at 77-78.

98. *Id.* at 506 (citing WIS. STAT. ANN. § 959.15 (1958), as amended, ch. 975 (West 1971)).

99. *Id.*

100. *See id.* at 507.

101. *See id.* at 508 (citing WIS. STAT. ANN. § 51 (West 1957)).

102. *See id.* (citing WIS. STAT. ANN. § 51.03 (West 1957)).

103. *See id.* at 506.

104. *See id.*

105. *Id.* at 505.

106. *Id.* at 508 (citing *Baxstrom v. Herold*, 383 U.S. 107, 110-12 (1966)).

under the Mental Health Act.¹⁰⁷ The Court considered two such justifications, that the commitment was triggered by a criminal conviction¹⁰⁸ and that there might be some special characteristics of sex offenders.¹⁰⁹ The Court found that these justifications carried little weight.¹¹⁰ At a minimum, according to the Court, the plaintiff's claims were substantial enough to warrant a remand for an evidentiary hearing.¹¹¹ But traditionally, under rational basis review, the state does not need to introduce or respond to evidence in order to demonstrate the rationality of its classification.

Gunther did not have much to say about *Humphrey*. He considered it an example of "avoidance," but a "less pronounced" example than other cases decided that Term.¹¹² Thus in *Humphrey*, commitment procedures under the Sex Crimes Act were invalidated not in accordance with any absolute standard that must be adhered to when anyone is committed (a due process issue), but rather because the standards were comparatively lower than those for commitment under the Mental Health Act. Gunther also noted that the underlying issue in *Humphrey* was an issue with which the Court was quite familiar—procedural fairness in a commitment process.¹¹³ Gunther supposed that the Court's willingness to apply heightened scrutiny in a familiar context like this would not necessarily suggest that the Court would apply a similar heightened scrutiny "to new spheres of legislative activity."¹¹⁴

Gunther thus used the six rationality cases from the 1971 Term as evidence of a new model of equal protection.¹¹⁵ As Gunther summarized the model, the new equal protection would be concerned with means, not ends.¹¹⁶ Tolerance of overinclusive and underinclusive classifications would be reduced.¹¹⁷ The Court would not exercise its imagination to identify legislative purpose but would insist that the state articulate its purposes.¹¹⁸ The Court would insist on an "affirmative relation between means and ends. . . . To a large extent, that is an empirical inquiry. The model would have the Court assess the justification for the classification largely in terms of information presented by the defenders of the law"¹¹⁹ The emphasis on means rather than ends would avoid "ultimate value judgments about the legitimacy and importance of legislative purposes."¹²⁰

107. *Id.* at 510.

108. *Id.*

109. *Id.* at 512.

110. *Id.* at 511-12.

111. *Id.* at 508.

112. Gunther, *supra* note 8, at 29 n.135.

113. *Id.* at 31.

114. *Id.* at 32.

115. *Id.* at 20.

116. *Id.* at 21.

117. *See id.* at 33.

118. *See id.* at 21.

119. *Id.* at 47.

120. *Id.* at 21-22.

Gunther indicated that parts of his model could be seen in the six equal protection cases he had discussed but that the Court's adherence to the model of "intensified rationality scrutiny" was "inchoate" and "fragmentary."¹²¹ In the years that followed, the Court never adopted the full version of the Gunther model. First, rather than developing an extensive jurisprudence of minimal scrutiny with bite, the Court instead adopted an intermediate level of scrutiny for certain classifications.¹²² As for avoidance of difficult value judgments, the 1971 term turned out to be a brief lull after which the Court very soon confronted and decided the privacy implications of *Griswold*¹²³ and the need for heightened scrutiny of gender¹²⁴ and illegitimacy¹²⁵ classifications. Further, the Court did not focus on means rather than ends. In the years to come, when a rational basis argument prevailed, the Court was as likely to have found an impermissible purpose at work as it was to have found an inadequate connection between classification and purpose.¹²⁶

In any case, Gunther's article on the 1971 Term set the stage for the next twenty-five years. Although his predictions were not uniformly correct, he had identified a method of analysis—heightened rationality review—that would recur from time to time in the Court's decisions. The next Part of this Article examines those cases in detail.

III. SUCCESSFUL MINIMAL SCRUTINY CLAIMS FROM 1972 TO 1996

Between the end of the Supreme Court's 1971 Term on which Gunther reported and the Court's 1996 decision in *Romer v. Evans*, the Court decided 110 cases in which it used minimal scrutiny.¹²⁷ Of these 110 cases, plaintiffs prevailed in only ten cases.¹²⁸ This Part examines these ten cases in detail. Before doing that, however, it begins with a brief excursus on rationality review of gender and illegitimacy classifications before the Court had formally adopted a heightened scrutiny for these classifications.

A. Early Rational Basis Review of Gender and Illegitimacy Classifications

The Supreme Court in 1976 in *Craig v. Boren*¹²⁹ formally adopted a standard of intermediate scrutiny for gender classifications—that the classification be substantially related to an important governmental interest.¹³⁰ Between the 1972

121. *Id.* at 36.

122. *See supra* notes 25-56 and accompanying text.

123. *See supra* notes 57-63 and accompanying text.

124. *See supra* notes 35-44 and accompanying text.

125. *See supra* notes 45-56 and accompanying text.

126. *See infra* notes 513-16 and accompanying text.

127. *See* Appendix.

128. These ten cases are listed in the Appendix and are discussed individually, *infra*, in Parts III.B. through III.I.

129. 429 U.S. 190 (1976).

130. *Id.* at 197.

publication date of Gunther's article and the 1976 publication of *Craig v. Boren*, the Court decided two cases involving gender classifications in which rational basis arguments were successful. In the first of these, *Weinberger v. Wiesenfeld*,¹³¹ decided in 1975, the Court invalidated a provision of the Social Security Act under which benefits were paid to the surviving widow of a covered worker but not to a surviving widower. In the other, *Stanton v. Stanton*,¹³² the Court invalidated a Utah statute under which the age of majority of women was eighteen while for men it was twenty-one. In the first case, the Court found that the gender classification was "entirely irrational."¹³³ In the second, the Court did not believe that it needed to determine the proper standard, since the gender classification would not survive any test, "compelling state interest, or rational basis."¹³⁴

It appears that in these two cases the Court was continuing to use the avoidance technique that Gunther had identified in his article. In both cases, the Court made no effort to announce a heightened level of scrutiny and concluded

131. 420 U.S. 636 (1975).

132. 421 U.S. 7 (1975).

133. *Wiesenfeld*, 420 U.S. at 651. According to the Court, the gender classification was based on the generalization that "male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support." *Id.* at 643. The Court admitted that there was some empirical support for the view that men are more likely than women to be the primary supporters of their families. *Id.* at 645. Under a truly deferential standard, this concession would have been enough to save the statute, because it would have meant that, taken as a whole, the class of men was not similarly situated to the class of women in relation to the subject of providing support for families.

However, although the Court did not announce any heightened scrutiny, it did find enough fault with the law to invalidate it. The Court found that the purpose of the law was to allow the surviving parent the opportunity to stay at home to care for children. *Id.* at 648-49. Since surviving parents could be fathers as well as mothers, "the gender-based distinction . . . is entirely irrational." *Id.* at 651. Citing both *Reed v. Reed*, 404 U.S. 71 (1971), and *Frontiero v. Richardson*, 411 U.S. 677 (1973), in which a plurality of the Court had unsuccessfully attempted to make gender a suspect classification, the Court found that men and women were in fact similarly situated under the survivors' provisions of the Social Security Act, and thus the statute violated the equal protection component of the Fifth Amendment. *Id.* at 653.

134. *Stanton*, 421 U.S. at 17. Although the parties to the case had argued over the appropriate level of scrutiny to be given to the gender classification with regard to the age of majority, the Court found it "unnecessary in this case to decide whether a classification based on sex is inherently suspect." *Id.* at 13. According to the Court, its decision in *Reed* controlled in this case. *Id.* Since *Reed* had used a rationality standard to invalidate a provision of the Idaho probate code, *id.*, the Court could use the same technique here. Despite the "old notions" about the proper roles for men and women, the Court perceived "nothing rational" in the statutory distinction by which a parent was liable for the support of a daughter only until she was eighteen but for a son until he was twenty-one. *Id.* at 14. According to the Court: "No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas." *Id.* at 14-15.

that neither of the two challenged statutes was “rational.” Of course, something more than traditional deference was at work here and the Court clearly had a heightened sensitivity to gender classifications. The Court finally formalized this standard one year later in *Craig v. Boren*. Looking back at *Wiesenfeld* and *Stanton*, they are better read as part of the pathway to intermediate scrutiny than they are as examples of successful minimal scrutiny claims. Therefore, they will not be considered.

The Court’s journey to a formal declaration of intermediate scrutiny for illegitimacy classifications took longer and had more detours. Gunther’s article itself discussed the Court’s invalidation of an illegitimacy classification in *Weber* and indicated that the standard of review was unclear.¹³⁵ For most of the next sixteen years, the Court never adequately clarified the standard. As a result, during that period, there were seven cases¹³⁶ before the Supreme Court that involved illegitimacy classifications in which the claim was successful but in which the standard of review was unclear. In these cases, the Court’s analysis often contained language of deferential rationality review, but sometimes also contained language that suggested a more demanding test, some kind of hybrid scrutiny. However, it was not until 1988 that the Court made it absolutely clear, in *Clark v. Jeter*,¹³⁷ that intermediate scrutiny was the standard.¹³⁸ Since in retrospect the seven cases are more properly viewed as way stations on the road to intermediate scrutiny, they will not be considered. The next sections of the paper consider each of the successful rationality cases.

135. Gunther, *supra* note 8, at 31.

136. *Reed v. Campbell*, 476 U.S. 852 (1986) (invalidating a Texas statute under which an illegitimate child could not inherit from his or her father, on the ground that the statutory distinction did not have an evident and substantial relation to the state’s interest in providing for the orderly and just estate administration); *Pickett v. Brown*, 462 U.S. 1 (1983) (invalidating Tennessee’s two year statute of limitations on paternity suits by illegitimates because the limitation was not substantially related to a legitimate state interest); *Mills v. Habluetzel*, 456 U.S. 91 (1982) (invalidating Texas’ one year statute of limitations on paternity suits brought by illegitimates because the limitation was not substantially related to a legitimate state interest); *Trimble v. Gordon*, 430 U.S. 762 (1977) (invalidating an Illinois statute under which illegitimate children could inherit only from their mothers, by means of a standard of review that requires, as a minimum, that the statutory classification bear some rational relationship to a legitimate state purpose, and sometimes requires more); *Jiminez v. Weinberger*, 417 U.S. 628 (1974) (invalidating a provision of the Social Security Act under which illegitimate children of a disabled wage-earner were not treated as well as legitimate children, on the grounds that the statutory distinction was not reasonably related to the purpose and was both overinclusive and underinclusive); *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973) (invalidating a New Jersey statute that limited welfare benefits to households in which the parents were adults of the opposite sex married to each other, without any discussion of the standard of review); *Gomez v. Perez*, 409 U.S. 535 (1973) (invalidating a Texas law that required fathers to support their legitimate, but not their illegitimate, children, on the grounds that a state may not invidiously discriminate against illegitimate children).

137. 486 U.S. 456 (1988).

138. *Id.* at 461.

*B. The Most Basic Economic Needs of Impoverished Human Beings:
Food Stamps, Welfare, and the Ascendancy of Dandridge Over Moreno*

Notwithstanding Gunther's article and his suggestion that the Court might begin to apply rational basis with bite, the Court's 1973 decision in *United States Department of Agriculture v. Moreno*¹³⁹ must have been surprising. In *Moreno*, the Court invalidated a food stamp regulation.¹⁴⁰ When the case is viewed in relation to other food stamp and welfare cases that the Court decided both before and after it, *Moreno* appears to be quite unusual indeed. This section will examine *Moreno* and then put it into a context of factually related Supreme Court cases in which the Court's reasoning and results were quite different.

In 1971 Congress amended the Food Stamp Act to limit eligibility to households made up of related individuals.¹⁴¹ Because households were the basic organizational unit of the food stamp program,¹⁴² the effect of the amendment was that unrelated persons living together in a household would no longer be eligible for food stamps. Several households containing an unrelated individual challenged the amendment as a violation of equal protection. The Court identified the traditional, very deferential standard of review as appropriate, that "a legislative classification must be sustained, if the classification itself is rationally related to a legitimate governmental interest."¹⁴³ The Court's analysis, however, was anything but deferential.

First, the Court looked at the relationship between the classification—households containing one or more unrelated persons—and the purposes of the Food Stamp Act as stated in the statute itself. The Food Stamp Act identified two purposes—the stimulation of the agricultural economy and the alleviation of hunger and malnutrition.¹⁴⁴ The Court found that one's status as related or unrelated to other members of one's household was "clearly irrelevant" to either of those two purposes.¹⁴⁵

The Court then looked for evidence of other statutory purposes. There was little legislative history.¹⁴⁶ The only relevant evidence of purpose the Court did find was a reference in a Conference Report and a statement on the floor of the Senate to the effect that the purpose of the amendment was to exclude "hippies" and "hippie communes" from the program.¹⁴⁷ The Court seized on these brief references to invalidate the amendment because its purpose was impermissible: "[A] bare congressional desire to harm a politically unpopular group cannot

139. 413 U.S. 528 (1973).

140. *Id.* at 538.

141. *See id.* at 530 (citing Act of Jan. 11, 1971, Pub. L. No. 91-671, 84 Stat. 2048).

142. *See id.* at 529 (citing 7 C.F.R. § 271.3(a) (1970)).

143. *Id.* at 533.

144. *See id.* at 533-34 (citing 7 U.S.C. § 2011 (1971)).

145. *Id.* at 534.

146. *See id.*

147. *Id.* (citing H.R. REP. NO. 91-1793, at 8 (1970)).

constitute a legitimate governmental interest.”¹⁴⁸

Surprisingly, the Court was unwilling to credit the government’s argument that the true purpose of the amendment was to reduce fraud in the food stamp program. The anti-fraud argument was that the government “might rationally have thought” that households with unrelated individuals were more likely to contain individuals who would abuse the program either by not reporting income or by “voluntarily remaining poor.”¹⁴⁹ As Justice Rehnquist explained in his dissent, the requirement that members of the household be related “provides a guarantee . . . that the household exists for some purpose other than to collect federal food stamps.”¹⁵⁰

The appeal to a purpose or set of facts that the government “might have considered” is a standard technique of rational basis review and the Court had just applied it two years earlier in *Dandridge v. Williams*.¹⁵¹ Yet the Court refused to defer to the government defendant and instead conducted its own evidentiary search for the actual purpose of the amendment to the Food Stamp Act. The prevention of fraud could not have been the purpose of the law, according to the Court, for two reasons. First, other provisions of the Food Stamp Act were aimed specifically at the problems of fraud, and thus, according to the Court’s reasoning, the new provision could not also have been an anti-fraud device.¹⁵² Second, the unrelated person rule was sufficiently broad that it would exclude some persons who were not trying to perpetrate fraud and at the same time not exclude others who were attempting fraud.¹⁵³ This is, of course, a classic problem of overinclusion and underinclusion, a problem usually thought to be without significance under traditional rational basis deference. However, here the Court used the broad swathe of the rule as evidence that the classification did not rationally further the prevention of fraud.¹⁵⁴ Thus, the Court was left with its original finding of purpose—the desire to harm a politically unpopular group. Because this purpose was itself impermissible, the amendment denied equal protection without more. The classification was “wholly without any rational basis.”¹⁵⁵

What is most surprising about *Moreno* is that it is a singular case set against a large group of contrary holdings. It has been suggested that the Court’s use of a heightened rational basis review in a case like *Moreno* results from the importance of the subject matter at issue—food for those who cannot afford it.¹⁵⁶

148. *Id.*

149. *Id.* at 535.

150. *Id.* at 546 (Rehnquist, J., dissenting).

151. 397 U.S. 471 (1970).

152. *See Moreno*, 413 U.S. at 536-37.

153. *See id.* at 537-38.

154. *Id.*

155. *Id.* at 538.

156. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-33, at 1611 (2d ed. 1988).

The Court has not always *referred* to the importance of the interest at stake when

The problem with this analysis is that it does not take into account the very substantial number of cases the Court has decided that involved “the most basic economic needs of impoverished human beings”¹⁵⁷ but in which the Court applied a highly deferential scrutiny that resulted in a rejection of the claim. The Court had decided one of these cases shortly before *Moreno* and would decide several more in the next twenty years, usually with no reference to *Moreno*.

The *Moreno* opinion in fact had cited *Dandridge* with apparent approval, both for the general statement of rationality review and for the proposition that classifications did not need to be “drawn with precise mathematical nicety.”¹⁵⁸ The Court gave no sign that it was uncomfortable with *Dandridge* or that there was any need to distinguish it. This is a surprising treatment of *Dandridge* since it had adopted a completely different view of equal protection as it relates to the basic economic needs of the poor.

In *Dandridge*, decided less than three years before *Moreno*, the Court rejected an equal protection challenge to a welfare regulation and, in doing so, announced an extraordinarily deferential standard of review. The case involved a Maryland welfare rule that established maximum grant limits for families receiving welfare benefits. The effect of the limit was that smaller families received a benefit equal to their full standard of need while larger families received less than their standard of need as calculated by the state. As the Court explained the standard of review:

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some “reasonable basis,” it does not offend the Constitution simply because the classification “is not made with mathematical nicety or because in practice it results in some inequality.” “The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.” “A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.” . . . [T]he intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court.¹⁵⁹

The Court indicated that “[t]he administration of public welfare assistance . . . involves the most basic economic needs of impoverished human beings.”¹⁶⁰ However, the Equal Protection Clause did not give to federal courts the “power

heightening its level of scrutiny, but it is hard to believe that importance was not at least a factor in the closer look taken by the Court where governmental deprivations affected the interest of the individual in receiving such subsistence benefits as food stamps.

Id.

157. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

158. *Moreno*, 413 U.S. at 533, 538 (quoting *Dandridge*, 397 U.S. at 485).

159. *Dandridge*, 397 U.S. at 485, 487 (citations omitted).

160. *Id.* at 485.

to impose upon the States their views on . . . economic or social policy.”¹⁶¹ The Court then went on to uphold the regulation, finding it was related to the state’s interests “in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor.”¹⁶² The Court admitted that, with regard to the employment goal, the statute was both overinclusive and underinclusive; however, the Court stated that “the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the State’s action be rationally based and free from invidious discrimination.”¹⁶³

Dandridge and *Moreno* stand as the two archetypal cases on constitutional claims involving basic human sustenance.¹⁶⁴ Over the next twenty-five years, arguments before the Court on these issues would ultimately come down to one question—which precedent controls. The answer turned out to be *Dandridge*.

In the years since *Moreno*, the Court has decided three food stamp cases¹⁶⁵ and three cases concerning Aid to Families with Dependent Children (“AFDC”)¹⁶⁶ in which the plaintiffs raised equal protection issues. In none of these cases did the Court use anything like the heightened rational basis review of *Moreno*, nor were any of the claims successful on the merits.¹⁶⁷

161. *Id.* at 486.

162. *Id.*

163. *Id.* at 486-87 (citation omitted).

164. Between *Dandridge* and *Moreno*, the Supreme Court had decided *Jefferson v. Hackney*, 406 U.S. 535 (1972), a case that resembled *Dandridge* far more than *Moreno*. In that case, the plaintiffs challenged the method by which Texas calculated welfare assistance grants. Having determined a standard of need for all those eligible for aid to the aged, the blind, the disabled, and families with dependent children, the state then applied a percentage reduction factor under which Aid to Families with Dependent Children (“AFDC”) recipients received the lowest percentage of need. *Id.* at 537. The Court cited the language of *Dandridge* in concluding that the statute was constitutional. *Id.* at 551. The Court said that it could not find that the “somewhat lower welfare benefits for AFDC recipients is invidious or irrational.” *Id.* at 549. The state “may have concluded that the aged and infirm are the least able of the categorical grant recipients to bear the hardships of an inadequate standard of living.” *Id.* The Court cited no evidence for what the state “may have concluded.”

165. See *infra* notes 168-210 and accompanying text.

166. See *infra* notes 211-15 and accompanying text.

167. The one case in which the Court was at all persuaded by a plaintiff’s argument involved a question of jurisdiction. In *Hagans v. Lavine*, 415 U.S. 528 (1974), AFDC recipients challenged a state regulation providing for recoupment from subsequent AFDC grants, monies that the state had paid as emergency rent payments. The plaintiffs presented both a statutory and a constitutional argument. In order to establish jurisdiction in federal court, they needed to demonstrate a “substantial constitutional claim.” *Id.* at 536. Although the district court had found jurisdiction, heard the case, and decided the statutory issue, the court of appeals reversed on the grounds that the plaintiffs had failed to present a “substantial constitutional claim” and thus the district court lacked jurisdiction to decide either the equal protection or the statutory claim. *Id.* at 532-33. The Supreme Court reversed again on the grounds that the equal protection claim was not necessarily

In 1977 in *Knebel v. Hein*,¹⁶⁸ the first of three post-*Moreno* food stamp cases, the Court considered an equal protection challenge to the Department of Agriculture's definition of "income" for purposes of determining the amount of a subsidy that a household would receive in purchasing food stamps.¹⁶⁹ The plaintiff challenged the rule because it included as income a transportation allowance that she received from the state to cover her expenses in commuting to a nurses' training school. The district court, citing *Moreno* five times, decided the case for the plaintiff.¹⁷⁰ It "could identify no rational basis for treating as income a training allowance which is fully expended for its intended purpose."¹⁷¹ Thus, according to the district court, the regulation was not related to the "statutory objective of providing adequate nutrition for low-income families," was "totally irrational," and "discriminated against recipients of transportation allowances."¹⁷²

The Supreme Court reversed.¹⁷³ Its only citation to *Moreno* was a footnote that explained the mechanics of the Food Stamp program.¹⁷⁴ Most of the Court's opinion addressed the statutory question of the Secretary's broad authority to promulgate a regulation defining income. As to the equal protection issue that had been decided adversely to the Secretary in the district court, the Court's entire discussion was one sentence long: "Since there is no question about the constitutionality of the statute itself, the implementation of the statutory purpose [to formulate and administer a food stamp program] provides a sufficient justification for . . . the federal regulations . . . to avoid any violation of equal protection guarantees."¹⁷⁵

The Court's only citations in support of its equal protection holding were *Weinberger v. Salfi*¹⁷⁶ and *Mathews v. de Castro*,¹⁷⁷ two Social Security cases in

so "frivolous or so insubstantial as to be beyond the jurisdiction of the District Court." *Id.* at 539. The Court also stated that "*Dandridge* evinced no intention to suspend the operation of the Equal Protection Clause in the field of social welfare law." *Id.* *Hagans* was not a decision on the merits and no equal protection decision ever resulted from it. Upon remand, the Court of Appeals for the Second Circuit eventually held that the challenged rule did not violate the federal statute or regulations. *Hagans v. Berger*, 536 F.2d 525, 532-33 (2d Cir. 1976). The Court thus reversed the earlier judgment of the district court and also remanded for the convocation of a three-judge court to determine the constitutional issues. *Id.* at 533. There is no reported opinion of what happened on remand.

168. 429 U.S. 288 (1977).

169. *Id.* at 289.

170. *Hein v. Burns*, 402 F. Supp. 398, 406-07 (S.D. Iowa 1975), *rev'd*, *Knebel v. Hein*, 429 U.S. 288 (1977).

171. *Knebel*, 429 U.S. at 291.

172. *Id.*

173. *Id.* at 297.

174. *Id.* at 292 n.9.

175. *Id.* at 296-97.

176. 422 U.S. 749 (1975).

177. 429 U.S. 181 (1976).

which the Court announced an extremely deferential standard of rational basis review. The Court apparently felt no need to distinguish *Moreno*, either in terms of the result in the case or in the close examination it had given to the identification of statutory purpose. *Knebel* may well be distinguishable from *Moreno*,¹⁷⁸ but the Court did not consider it necessary to explain why.

In 1986, the Court decided its second post-*Moreno* food stamp case, *Lyng v. Castillo*.¹⁷⁹ Congress had further amended the Food Stamp Act by redefining the term "household." Previously, "household" had been defined, in part, as "a group of . . . individuals, who are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common."¹⁸⁰ In response to abuses in the program,¹⁸¹ Congress amended the definition to provide that "parents and children, or siblings, who live together shall be treated as a group of individuals who customarily purchase and prepare meals together for home consumption even if they do not do so."¹⁸² Once again, the district court, relying primarily on *Moreno* as requiring a heightened scrutiny, invalidated the amendment on the grounds that traditional families living together should not receive less protection than a politically unpopular group.¹⁸³

The Supreme Court again reversed, ruling that the district court erred in using heightened scrutiny.¹⁸⁴ The Court's only textual citation to *Moreno* was to establish the basic rational basis standard, that a classification need only be "rationally related to a legitimate governmental interest."¹⁸⁵ In a footnote,¹⁸⁶ the Court distinguished *Moreno* on its facts. In *Moreno*, according to the Court, the definition of "household" "completely disqualified all households" with an unrelated individual.¹⁸⁷ This disqualification "did not further the interest in

178. For example, the Court could have contrasted *Moreno* and *Knebel* on the grounds that the exclusion in *Moreno* kept entire households out of the program while the definition of income in *Knebel* simply limited the amount of food stamps available to a household without excluding any otherwise eligible household from the program. Alternatively, the Court in *Knebel* could have explained that there was no evidence anywhere that the amended definition of income was the result of a mere desire to harm a politically unpopular group.

179. 477 U.S. 635 (1986).

180. The Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703.

181. This definition of "household" did not prevent persons living together from manipulating the rules in order to receive greater benefits. By claiming that they did not purchase food and prepare meals together, individuals could establish separate households and qualify for a higher level of benefits. See *Castillo*, 477 U.S. at 637.

182. *Id.* at 636 n.1 (quoting 7 U.S.C. § 2012(i) (1964), as amended by Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357, 358; Omnibus Budget Reconciliation Act of 1982, Pub. L. No. 97-253, 96 Stat. 763, 772).

183. See *id.* at 637-38.

184. *Id.* at 638.

185. *Id.* at 639.

186. *Id.* at 639 n.3.

187. *Id.*

preventing fraud, or any other legitimate purpose.”¹⁸⁸ By contrast, according to the Court, the definition of “household” in *Castillo* would not necessarily disqualify an entire household and it might result only in a reduction in benefits.¹⁸⁹ The relevance of the Court’s distinction is not clear. Why does the lesser effect on households in *Castillo* demonstrate the required connection with purpose? The implicit suggestion in *Castillo* is that, if in *Moreno* the government had reduced benefits to hippies rather than eliminating those benefits entirely, that lesser effect would somehow have saved the statute. But nothing in *Moreno* would support such a suggestion.

The Court in *Castillo* found that Congress’ appropriate concerns with mistake, fraud, and the cost-ineffectiveness of case-by-case analysis justified “the use of general definitions.”¹⁹⁰ One of the cases cited to support this point was *Dandridge*.¹⁹¹ The Court found that “the justification for the statutory classification is obvious.”¹⁹² Congress had a rational basis for treating relatives who live together differently from others. Congress “could reasonably determine” that close relatives sharing a home were more likely to purchase and prepare meals together than were others.¹⁹³ That close relatives made up a large percentage of food stamp recipients “might well have convinced” Congress that different treatment was justified.¹⁹⁴ Furthermore, Congress “might have reasoned” that it would be easier for close relatives than for others to accommodate themselves to a rule that required them to prepare meals together.¹⁹⁵ Nowhere did the Court insist on any evidence to support these assumptions.

For Justice Marshall, who dissented, *Moreno* could not be distinguished and thus was controlling: “[T]he critical fact in both cases is that the statute drew a distinction that bears no necessary relation to the prevention of fraud.”¹⁹⁶ Marshall pointed out that the legislative history made it clear that the amendment was an anti-fraud measure, yet “the Committee Reports cite[d] no hard evidence that related persons living together were in fact significant sources of fraud.”¹⁹⁷ To the extent that the majority had agreed with Justice Marshall that *Moreno* was controlling, the demand for evidence of possible fraud would have been appropriate. However, the majority had ignored *Moreno*; traditional deference does not demand evidence to support legislative assumptions. Justice Marshall’s attempt to use *Moreno* as the controlling precedent failed.

In 1988, the Court decided its third post-*Moreno* food stamp case, *Lyng v.*

188. *Id.*

189. *Id.*

190. *Id.* at 640-41.

191. *See id.* at 641 n.7.

192. *Id.* at 642.

193. *Id.*

194. *Id.*

195. *Id.* at 643.

196. *Id.* at 646 (Marshall, J., dissenting).

197. *Id.*

International Union.¹⁹⁸ Congress in 1981 had amended the Food Stamp Act to provide that households would not be eligible for food stamps while any member of the household was on strike.¹⁹⁹ Once again, relying in part on *Moreno*, the district court found that the amendment violated the Equal Protection Clause because, inter alia, it was based on an animus against an unpopular political minority—strikers.²⁰⁰ The Supreme Court once again reversed. The Court's citation to *Moreno* was surprising. *Moreno* was used to support the proposition that rationality was the appropriate standard of review and that this standard was "typically quite deferential."²⁰¹ The Court then had "little trouble in concluding that [the amendment] is rationally related to the legitimate governmental objective of avoiding undue favoritism to one side or the other in private labor disputes."²⁰² The Court accepted the argument that making strikers eligible for food stamps was a subsidy to strikers and would thus serve as a weapon for one side in labor disputes.²⁰³

Significantly, the Court cited *Dandridge* for the proposition that it was not empowered to reject the views of Congress on economic or social policy.²⁰⁴ The Court minimized the effect of *Moreno* in a footnote. *Moreno* was not support for the proposition that "strikers as a class are entitled to special treatment."²⁰⁵ The Court explained that what had appeared to be the holding in *Moreno*—that a bare desire to harm a politically unpopular group is not a legitimate purpose—was "merely an application of the usual rational-basis test," a test that the Court insisted had in fact been applied in *Moreno*.²⁰⁶

Justice Marshall's dissenting opinion would have relied on *Moreno* to invalidate the striker amendment. Just as the Court in *Moreno* had refused to credit the government's assertion that the purpose of the amendment was the prevention of fraud, so Justice Marshall refused to credit the government's assertion that the purpose of the amendment was to promote neutrality.²⁰⁷ That claim ignored the fact that the federal government has become deeply involved in the lives of Americans, in both labor and management. While the amendment to the Food Stamp Act would cause workers to lose their food stamps during a strike, management would not be forced to give up a host of government

198. 485 U.S. 360 (1988).

199. See *id.* at 363 n.2 (citing 7 U.S.C. § 2015(d)(3) (1986), as amended by Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357, 361).

200. *International Union v. Lyng*, 648 F. Supp. 1234, 1239-40 (D.D.C. 1986), *rev'd*, *Lyng v. International Union*, 485 U.S. 360 (1988).

201. *International Union*, 485 U.S. at 370. The Court also cited *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), and *Dandridge v. Williams*, 397 U.S. 471 (1970).

202. *International Union*, 485 U.S. at 371.

203. *Id.*

204. *Id.* at 372 (citing *Dandridge*, 397 U.S. at 486).

205. See *id.* at 370 n.8.

206. *Id.*

207. *Id.* at 380-81 (Marshall, J., dissenting).

subsidies, contracts, and other benefits that it was receiving.²⁰⁸ For Justice Marshall, the amendment was not an instrument of neutrality but rather a one-sided penalty on strikers.²⁰⁹ With the veneer of neutrality removed and along with it the claim that neutrality was the purpose of the law, Justice Marshall cited legislative history from precursors to the 1981 Amendment in order to demonstrate that the actual purpose of the amendment, arising out of public animus against strikers, was “to increase the power of management over workers, using food as a weapon in collective bargaining.”²¹⁰

The food stamp cases, particularly *Lyng v. International Union*, look strikingly like *Moreno* and yet the Court found *Moreno* to be of little significance. By contrast, all three of the District Courts considered *Moreno* to be controlling, both in terms of the kind of review and the result in the case. However, the Supreme Court’s post-*Moreno* food stamp cases appear to have marginalized it, so that, although it has never been overruled, it is for the most part limited to its facts.

The Supreme Court’s other welfare cases after *Moreno* confirm that the Court considers the Equal Protection Clause to have extremely little to say about how the government runs its food stamp and welfare programs. As the Court had explained in *Dandridge*, even though constitutional arguments about welfare involve “the most basic economic needs of impoverished human beings,” the Court is not empowered to impose its views on the legislature.²¹¹ Thus, the Court applied minimal scrutiny and (1) in 1980 rejected an equal protection challenge to the lower level of AFDC reimbursement that residents of Puerto Rico received in comparison to the levels received by residents of the states,²¹² (2) in 1987 rejected an equal protection challenge to an AFDC rule that required a family seeking AFDC benefits to include as family income child support payments received from a noncustodial parent,²¹³ and (3) in 1990 rejected an equal protection challenge to an AFDC rule that a child’s insurance benefits under the Social Security Act are not “child support” and thus there was no requirement to “disregard” the first fifty dollars of the benefit in calculating family income.²¹⁴

208. See *id.* at 382.

[B]usinesses may be eligible to receive a myriad of tax subsidies through deductions, depreciation, and credits, or direct subsidies in the form of Government loans through the Small Business Administration (SBA). Businesses also may receive lucrative Government contracts and invoke the protections of the Bankruptcy Act against their creditors. None of these governmental subsidies to businesses is made contingent on the businesses’ abstention from labor disputes, even if a labor dispute is a direct cause of the claim to a subsidy.

Id.

209. *Id.* at 382-83.

210. *Id.* at 383-84 (citing H.R. REP. NO. 95-464, at 129 (1977)).

211. *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970).

212. *Harris v. Rosario*, 446 U.S. 651 (1980).

213. *Bowen v. Gilliard*, 483 U.S. 587 (1987).

214. *Sullivan v. Stroop*, 496 U.S. 478, 485 (1990).

In these cases, the Court addressed what it considered to be the appropriate standard. A classification would not violate the Equal Protection Clause "if any state of facts reasonably may be conceived to justify it."²¹⁵ Decisions about spending money for the public welfare were not for the courts: "The discretion belongs to Congress unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment."²¹⁶ *Dandridge* is triumphant.

C. *Education and the Ascendancy of Rodriguez Over Plyler*

After deciding *Moreno* for the plaintiffs in 1973, the Court retired from the business of heightened rationality review for nine years. It was not until 1982 that another rational basis claim was successful. In that year, the Court decided two such cases; the first, *Plyler v. Doe*,²¹⁷ involved education, and the second, *Zobel v. Williams*,²¹⁸ concerned newcomers.

In *Plyler*, the Court considered an equal protection challenge to a Texas law that denied free public education to undocumented school age children. The Court's opinion cited with apparent approval its earlier decision in *San Antonio School District v. Rodriguez* for the proposition that education is not a fundamental right under the Constitution.²¹⁹ However, the Court then went on to say that "neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation," because of its importance in "maintaining our basic institutions" and "the lasting impact of its deprivation on the life of a child."²²⁰ This special status of education meant that the traditional deference that the Court applied in *Rodriguez* was not appropriate either.²²¹ In determining the appropriate level of review, the Court adopted a hybrid standard. According to the Court, the test was "rationality," but in the context of a complete deprivation of public education to a particular group, such a deprivation could "hardly be considered rational unless it further[ed] some substantial goal of the State."²²² This statement of rationality review is not the traditional one. The Court required that the classification "further" the state interest, which suggests a more direct connection to purpose than the ordinary "rational relation;" and, in addition, the state interest had to be "substantial," which is clearly a more demanding test than that of "legitimacy."

In applying this hybrid standard, the Court was not deferential. It identified three "colorable" state interests at which the statute might be aimed.²²³ The first

215. *Id.* at 485 (quoting *Bowen v. Gilliard*, 483 U.S. 587, 601 (1987)).

216. *Bowen*, 483 U.S. at 598 (citations omitted).

217. 457 U.S. 202 (1982).

218. 457 U.S. 55 (1982).

219. *Plyler*, 457 U.S. at 221 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973)).

220. *Id.*

221. *See id.* at 223.

222. *Id.* at 224.

223. *Id.* at 227.

was protection from an influx of illegal immigrants.²²⁴ Assuming that this was a substantial interest, a point the Court did not address, the exclusion of aliens from schools was “hardly . . . an effective method of dealing with [the problem],” and charging these children tuition was a “ludicrously ineffectual attempt to stem the tide of illegal immigration.”²²⁵ There was “no evidence in the record”²²⁶ that illegal immigrants imposed a significant burden on the state’s economy.²²⁷ However, under traditional rational basis review, the Court usually does not search the record for evidence that the legislature was in fact correct in its judgment and the state ordinarily need not choose the most effective method of dealing with a problem.

Second, the Court considered the argument that undocumented school children could be treated differently “because of the special burdens they impose on the State’s ability to provide high-quality public education.”²²⁸ Assuming that this is a substantial purpose, a point the Court once again did not address, the Court found no adequate connection between the classification and purpose. Again, the Court looked to “the record” but found no “credible supporting evidence” that the presence of alien children would affect the quality of education in the public schools.²²⁹ In the course of examining the record, the Court transformed the state’s concern about the special burdens imposed on the school system by students with special needs into something else. The state’s financial argument seems to have been of the nature that extra money spent on alien children would mean less money for other students, not an illogical claim. However, the Court insisted that the state put into the record evidence that this transfer of resources would have a negative effect on the overall quality of the educational program that was being offered. This the state had not done.

Finally, the Court considered the state’s claim that the exclusion of aliens was justified because they are less likely to remain in the state and use their education productively within the state.²³⁰ However, according to the Court, the state has no assurance that any child, citizen or not, will remain in the state and the “record [was] clear” that many undocumented children would remain in this country.²³¹ Thus, the exclusion of aliens from schools did not further this interest either. Having found that none of the interests put forth by the state were furthered by the exclusion of aliens, the Court concluded that the denial did not further any substantial state interest and thus violated the Equal Protection Clause.²³²

Four dissenters in the case, in an opinion written by Chief Justice Burger,

224. *See id.* at 228.

225. *Id.* (citation omitted).

226. *Id.*

227. *See id.*

228. *Id.* at 229.

229. *Id.* (quoting *In re Alien Children Educ. Litig.*, 501 F. Supp. 544, 583 (S.D. Tex. 1980)).

230. *Id.* at 229-30.

231. *Id.* at 230.

232. *Id.*

would have applied the traditional rational basis test the Court used nine years earlier in *Rodriguez*.²³³ In that case, the Court had reviewed the system under which the public schools in Texas were financed largely on the basis of property taxes.²³⁴ Because the value of property varied widely from one school district to another, both in absolute terms and per student, the amount of money spent per student also varied widely.²³⁵ The plaintiffs in *Rodriguez* claimed that interdistrict variations in school spending violated the Equal Protection Clause. The Court rejected the claim. Although the Court cited *Brown v. Board of Education*²³⁶ for the proposition that education is the most important function of local government,²³⁷ the Court explained that education was not a fundamental right since it was not “explicitly or implicitly guaranteed by the Constitution.”²³⁸ Thus, the appropriate standard was whether the classifications created by the Texas system of funding local schools were rationally related to a legitimate state interest.²³⁹ The Court found that the funding of schools from local property taxes was rationally related to the legitimate interest of maintaining local control of schools.²⁴⁰ The result in *Rodriguez* seemed to send the message that the Court would take a hands-off attitude with regard to constitutional challenges to public schools.

As the dissenters in *Plyler* pointed out, the Court already announced in *Rodriguez* that the thing that made an interest “fundamental” was not how important the interest was to the people involved,²⁴¹ but whether that interest could be found in the Constitution. Why, then, had the majority in *Plyler* created a special status for education as something different from other governmental benefits? The Court in *Rodriguez* had held that no right to education could be found in the Constitution. The *Plyler* dissent called the majority’s explanation of the special constitutional status for education “opaque” and claimed that the majority opinion “rests on such a unique confluence of theories and rationales that it will likely stand for little beyond the results in these particular cases.”²⁴²

For the dissenters, since education was not a fundamental right, and since there is no “constitutional hierarchy”²⁴³ for non-fundamental governmental services, the standard of review should have been deferential. The dissenters identified “prudent conservation of finite state revenues” as a permissible goal.²⁴⁴ In terms of singling out illegal aliens, the dissent considered it not irrational for

233. *Id.* at 247-48 (Burger, C.J., dissenting).

234. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 6-16 (1973).

235. *See id.* at 8-16.

236. 347 U.S. 483 (1954).

237. *Rodriguez*, 411 U.S. at 29 (quoting *Brown*, 347 U.S. at 493).

238. *Id.* at 34-35.

239. *See id.* at 44.

240. *Id.* at 47-55.

241. *Plyler v. Doe*, 457 U.S. 202, 247-48 (1982) (Burger, C.J., dissenting).

242. *Id.* at 243, 247.

243. *Id.* at 248.

244. *Id.* at 249.

the state to treat differently those legally in the country and those not here legally. In determining who is a bona fide resident for school attendance purposes, the state could reasonably make illegality of residence a relevant factor.²⁴⁵ Nor should the state be forced to prove, as the majority demanded, that additional expenditures on illegal alien children would diminish the quality of education generally.²⁴⁶ Under rational basis review, the state could use any savings that accrued in whatever manner it considered appropriate.²⁴⁷

It was not originally clear how much of *Rodriguez* survived *Plyler*. The cases can be distinguished on their facts. None of the plaintiffs in *Rodriguez* was completely denied public school education. Their claim was that the education they were receiving was not as good as that received by children in other public school systems. On the other hand, the undocumented school children in *Plyler* were completely denied a free public education. However, this narrow factual distinction accounts for only a small part of the contradiction within the cases. Although *Plyler* cited *Rodriguez* with apparent approval, the two cases are directly contrary with regard to the kind of review that the Equal Protection Clause demands of differences in educational opportunities. *Rodriguez* insisted that education is just like any other governmental benefit; *Plyler* found that education is different from other benefits and is entitled to closer scrutiny.

Is *Plyler* a rejection of *Rodriguez* and does it create a new standard of review for educational classifications? Apparently not. Since *Plyler*, the Court has been at pains to limit the case to its facts—a total denial of public education—and to interpret it as consistent with *Rodriguez*. For example, a year later in *Martinez v. Bynum*,²⁴⁸ the Court found that a bona fide residence requirement with respect to attendance at public school did not violate the Equal Protection Clause. According to the Court, “the question is simply whether there is a rational basis for it.”²⁴⁹ The residence requirement was related to the school district’s legitimate interests in limiting public services to residents, in planning and operating the schools, and in maintaining the quality of the schools.²⁵⁰

In *Kadrmas v. Dickinson Public Schools*,²⁵¹ in 1988, the Court reviewed North Dakota’s failure to provide free bus service for public school students in all of the state school districts. The Court cited both *Rodriguez* and *Plyler* for the propositions that ordinarily a classification need only be rationally related to a legitimate governmental purpose and that education is not a fundamental right.²⁵² The Court admitted that *Plyler* had applied a “heightened scrutiny” but also insisted that *Plyler* was “unique” in its circumstances, theories, and rationales.²⁵³

245. See *id.* at 250 (citations omitted).

246. See *id.* at 252.

247. See *id.*

248. 461 U.S. 321 (1983).

249. *Id.* at 329 n.7.

250. See *id.* at 328-30.

251. 487 U.S. 450 (1988).

252. *Id.* at 457-58.

253. *Id.* at 459.

The Court in *Kadrmas* cited one of the most deferential versions of rational basis review, that a statute does not violate equal protection ““unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature’s actions were irrational.””²⁵⁴ Significantly, the Court in *Kadrmas* did not insist on evidence in the record that the classification in fact advanced a legislative purpose. Quite the contrary. The Court explained that it was “not bound by explanations of the statute’s rationality that may be offered by litigants or other courts. Rather, those challenging the legislative judgment must convince us ‘that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.’”²⁵⁵ The Court then upheld the statute because, *inter alia*, “the legislature could conceivably have believed” that forbidding bus fees in reorganized districts protected reasonable expectations and “could just as rationally conclude,” as to nonreorganized districts, that those districts should have the option of requiring bus users to pay the cost of service.²⁵⁶

In 1986, in *Papasan v. Allain*,²⁵⁷ the Court issued an opinion that confirmed the limited reach of *Plyler*, but also suggested that equal protection claims in the education area were not completely hopeless. The case concerned school districts in northern Mississippi that, for historical reasons, did not receive as large a state educational grant as did school districts in other parts of the state.²⁵⁸ At a glance, the case would appear to be about inequities in the way public schools are financed and thus controlled by *Rodriguez*. Yet, the Court determined that the issues in the case had not been properly presented and so the case was remanded without a decision on the merits.²⁵⁹ Yet, the Court’s opinion did make some comments on the relevance of *Rodriguez* and *Plyler*. The Court cited *Rodriguez* as setting forth the appropriate test—whether the school financing scheme bore a rational relationship to a legitimate state purpose.²⁶⁰

254. *Id.* at 463 (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)).

255. *Id.* (quoting *Vance*, 440 U.S. at 111).

256. *Id.* at 465.

257. 478 U.S. 265 (1986).

258. *Id.* at 269-73.

259. *Id.* at 289. The Court stated:

[T]he question remains whether the variations in the benefits received by school districts from Sixteenth Section or Lieu Lands are, on the allegations in the complaint and as a matter of law, rationally related to a legitimate state interest. We believe, however, that we should not pursue this issue here but should instead remand the case for further proceedings. Neither the Court of Appeals nor the parties have addressed the equal protection issue as we think it is posed in this case: Given that the State has title to assets granted to it by the Federal Government for the use of the State’s schools, does the Equal Protection Clause permit it to distribute the benefit of these assets unequally among the school districts as it now does?

Id.

260. *Id.* at 286.

The Court stated that *Plyler* “did not . . . measurably change the approach articulated in *Rodriguez*.”²⁶¹ The Court explained further that: “As *Rodriguez* and *Plyler* indicate, this Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review.”²⁶²

The Court in *Papasan* did not resolve that issue, but it did conclude that *Rodriguez* was not controlling on its facts. *Rodriguez* involved a challenge to the entire system of funding public schools while *Papasan* was only concerned with one aspect of school financing.²⁶³ As the Court explained, “*Rodriguez* did not . . . purport to validate all funding variations that might result from a State’s public school funding decision.”²⁶⁴ Thus, *Papasan* slightly opened a door that had appeared to be shut. But not much has come from *Papasan*. The case was settled on remand and there was thus never a judicial determination of whether or not the funding differential violated the Equal Protection Clause.²⁶⁵ *Rodriguez* still appears to be ascendant.

D. Preferences for Established Over Newer Residents

In 1982 and 1985, the Court decided two cases in which it used rational basis review to invalidate state laws that created preferences for established residents over newer residents.

The 1982 case was *Zobel v. Williams*,²⁶⁶ in which the Court reviewed an Alaska statute that established a mechanism for distributing a portion of the state’s newly acquired oil wealth. Under the statute as enacted, each resident of Alaska at least eighteen years of age would receive one dividend unit for each year of residency since statehood in 1959.²⁶⁷ For 1979, the first year in which there was to be a distribution, the amount of the dividend unit was set at \$50.00.²⁶⁸

The plaintiffs in the case had argued for heightened scrutiny on the grounds that the statute infringed on the implied fundamental right to travel.²⁶⁹ The Court determined that it did not need to decide whether heightened scrutiny was

261. *Id.* at 285.

262. *Id.*

263. *See id.* at 286-87.

264. *Id.* at 287.

265. *See Papasan v. United States*, No. DC 81-90-B-0, 1989 U.S. Dist. Lexis 17535 (N.D. Miss., Feb. 29, 1989) (stipulating, in consent judgment, that “[t]hese disparities [in funding school districts] are discriminatory, without a rational basis, and are in violation of the plaintiffs’ equal protection rights secured by the Fourteenth Amendment of the United States Constitution”).

266. 457 U.S. 55 (1982).

267. *See id.* at 57.

268. *See id.*

269. *Id.* at 60 n.6.

necessary if the statutory scheme could not even pass minimal scrutiny.²⁷⁰ Thus the question before the Court was whether the distinctions created by the statute rationally furthered a legitimate state purpose.²⁷¹ The state identified three purposes that were advanced by the statutory scheme: (1) "creation of a financial incentive for individuals to establish and maintain residence in Alaska;" (2) "encouragement of prudent management of the [oil fund];" and (3) apportioning benefits for past contributions made by residents to the state.²⁷²

The Court found the statutory distinctions created by the statute were not rationally related to the first two purposes, which were assumed to be valid.²⁷³ In both instances, the problem arose out of the retroactive application of the distribution scheme. Obviously, a statute enacted in 1980 could not possibly have created any incentives in 1959 to move to or to remain in Alaska.²⁷⁴ With regard to incentives to move to or remain in Alaska after 1980, all residents in Alaska as of that date were similarly situated with respect to the incentives for maintaining residence and thus should be treated the same. There might also have been equal protection difficulties with a prospective application of the distribution scheme because it would have created different levels of incentives for residents with different years of past residence. However, the Court did not need to decide that issue because the Alaska legislature provided in the statute that invalidation of any part of the statute would result in invalidation of the whole.²⁷⁵

Retroactive application of the distribution scheme was also not rationally related to the second purpose—prudent management of the oil fund.²⁷⁶ The argument advanced by the state was that, if current residents were not given a larger stake in the fund than future residents, then the current residents would demand that the fund make immediate, high-risk investments, which also would have the effect of encouraging "rapacious development."²⁷⁷ Once again, even assuming this argument has some weight prospectively, still, a distribution scheme that awards substantial money for years of previous residence is not related to the concern about the consequences of the arrival of future residents.²⁷⁸

This left the state with only one purpose—to reward citizens for past contributions, which the Court determined was not legitimate.²⁷⁹ The Court did not explain why the purpose was illegitimate, but pointed out that if that purpose were allowed, then other "rights, benefits, and services" could be apportioned according to length of residency with the result that state residents would be

270. *Id.* at 60-61.

271. *See id.* at 60.

272. *Id.* at 61 (citing *Williams v. Zobel*, 619 P.2d 448, 458 (Alaska 1980)).

273. *Id.* at 61-62.

274. *See id.* at 62.

275. *Id.* at 64-65.

276. *See id.* at 62.

277. *Id.*

278. *See id.* at 63.

279. *Id.*

divided into “expanding numbers of permanent classes.”²⁸⁰ Justice Brennan’s concurrence argued that the real problem with the past contributions argument was that, as a measuring device, it equated past contributions with years of residence; however, “length of residence has only the most tenuous relation to the *actual* service of individuals to the State.”²⁸¹

The Court in *Zobel* claimed to have invalidated the Alaska distribution scheme without applying heightened scrutiny, but this clearly was not the most deferential level of scrutiny. Lurking in the background throughout the case were the Court’s previous cases on preferential treatment for established residents. Those cases had invalidated such preferences by using strict scrutiny because of the infringement on the implied fundamental right to travel.²⁸² Although the Court claimed not to be relying on those cases,²⁸³ they appear to have influenced the Court.²⁸⁴ It was hardly traditional deference when the Court found that the Alaska distribution scheme did not adequately advance the state’s first two objectives—incentives for residence and prudent management of the fund. Traditionally, the state need not adopt the most efficient means for achieving its end, only a means that the legislature could reasonably believe had a rational relation with that end. Even if the retroactive application of the scheme was irrational, the possible rationality of the prospective application of the scheme might have been a sufficient connection with the achievement of statutory purpose to save the statute. The Court in *Zobel* also did not attempt to hypothesize additional purposes that might have saved the statute.

In 1985, in *Hooper v. Bernalillo County Assessor*,²⁸⁵ the Court decided a second rationality case involving preferences for established over newer residents. The case arose out of a property tax exemption for certain Vietnam-era veterans who had been residents of New Mexico before May 8, 1976.²⁸⁶ The plaintiff in the case was a Vietnam veteran who established residence in New Mexico in 1981 and was therefore denied the exemption. As the Court described the workings of the statute, it was similar to the distribution scheme in *Zobel* in that it created “‘fixed, permanent distinctions between . . . classes of concededly bona fide residents’ based on when they arrived in the State.”²⁸⁷ Also, as in

280. *Id.* at 64.

281. *Id.* at 71 (Brennan, J., concurring).

282. *E.g.*, *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 269 (1974) (invalidating one-year residence requirement for free medical care); *Dunn v. Blumstein*, 405 U.S. 330, 360 (1972) (invalidating one-year residence requirement for voting); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (invalidating one-year residence requirement for welfare benefits), *overruled in part by* *Edelman v. Jordan*, 415 U.S. 651 (1974).

283. *Zobel*, 457 U.S. at 58.

284. *See id.* at 82 (Rehnquist, J., dissenting). Justice Rehnquist insisted that the Court had invalidated preferences for established residents only when the Court was concerned about the infringement of the fundamental right to travel, an infringement that would trigger strict scrutiny.

285. 472 U.S. 612 (1985).

286. *Id.* at 614.

287. *Id.* at 616 (quoting *Zobel*, 457 U.S. at 59).

Zobel, the Court did not see the need to decide the question of heightened scrutiny since the tax exemption could not even pass the minimum rationality test.²⁸⁸

The state court had identified two purposes that the tax exemption served. The first was that it “encourage[d] veterans to settle in the State” and the second was that it “serve[d] as an expression of the State’s appreciation to its own citizens for honorable military service.”²⁸⁹ The Court found that the exemption, limited to veterans who established residence before May 8, 1976, was not rationally related to the purpose of encouraging settlement in New Mexico.²⁹⁰ The legislature had not established the eligibility date until long after the triggering event had occurred.²⁹¹ A veterans benefit not created until 1981 could not possibly have attracted veterans to New Mexico in 1976.²⁹² As in *Zobel*, the retroactive application of the statute was irrational in that it was not related to the supposed end.

The Court indicated that the second purpose—rewarding veterans for past service—was both legitimate and consistent with longstanding national policy.²⁹³ Yet while the state was free to choose to reward all of its resident veterans or to reward no veterans at all, it could not make distinctions between established resident veterans and newer resident veterans.²⁹⁴ The Court identified problems with both the means and ends. It was difficult for the Court to imagine that the New Mexico legislature could have believed that its residents suffered more than veterans from other states so that New Mexico could consider its residents differently situated.²⁹⁵ Even if the state could grant benefits “on the basis of a coincidence between military service and past residence,” the fixed date exemption provision was not rationally related to that goal.²⁹⁶ The statute did not “require any connection between the veteran’s prior residence and military service.”²⁹⁷ A person who resided in New Mexico for a short time as an infant, before 1976, would qualify as soon as he moved to New Mexico at any time in the future.²⁹⁸

More important than this technical argument was the Court’s much stronger point—singling out previous residents to receive the benefit is “not a legitimate state purpose.”²⁹⁹ There could be no valid distinction between older and newer

288. *Id.* at 618.

289. *Id.* at 618-19 (quoting *Hooper v. Bernalillo County Assessor*, 679 P.2d 840, 844 (N.M. Ct. App. 1984)).

290. *Id.* at 619.

291. *See id.*

292. *See id.* at 619-20.

293. *Id.* at 620.

294. *Id.* at 620-21.

295. *Id.* at 621.

296. *Id.* at 621-22 (footnote omitted).

297. *Id.* at 622 (footnote omitted).

298. *See id.*

299. *Id.* at 622-23 (quoting *Zobel v. Williams*, 457 U.S. 55, 63 (1982)).

residents. "Newcomers, by establishing bona fide residence in the State, become the State's 'own' and may not be discriminated against solely on the basis of their arrival date in the State" ³⁰⁰

Zobel and *Hooper* may appear to suggest that the Court has created a general prohibition of preferences for established residents over newer residents. Some of the Court's right to travel cases that applied strict scrutiny and invalidated durational residence requirements are consistent with this view. However, there are several precedents to the contrary. The Court has upheld durational residence requirements imposed by states (1) to qualify for the benefits of lower university tuition,³⁰¹ (2) to be eligible to bring a divorce action,³⁰² and (3) to run for state senator³⁰³ or governor.³⁰⁴ And seven years after *Hooper*, the Court in *Nordlinger v. Hahn* ³⁰⁵ approved a property tax scheme that gave a decided advantage to long-term homeowners over more recent purchasers of homes. In that case, the Court found that neighborhood preservation and stability along with the protection of homeowners' expectation interests were overarching values, and that a preference for longer-term homeowners was related to those goals.³⁰⁶ However, as Justice Stevens pointed out in dissent,³⁰⁷ protecting expectation interests was just a nice way of explaining that certain people are preferred because they have lived in a certain place for a long time. This seems inconsistent with *Zobel* and *Hooper*.

E. Preferences for State Residents Over Nonresidents

In 1985, the Court decided two unusual cases in which rational basis claims were successful.³⁰⁸ Both involved state tax classifications that treated residents or resident corporations differently from nonresidents. Notwithstanding a long tradition of extreme deference to state tax classifications,³⁰⁹ the Court invalidated both statutes as creating an impermissible preference for the "home team." The results in both cases are difficult to justify and they seem to be limited to their

300. *Id.* at 623.

301. *Vlandis v. Kline*, 412 U.S. 441 (1973). While the Court's holding in *Vlandis* was somewhat narrower, it did acknowledge a state's ability to enforce such a requirement. *Id.* at 452-53 & n.9.

302. *Sosna v. Iowa*, 419 U.S. 393 (1975).

303. *Sununu v. Stark*, 420 U.S. 958 (1975) (mem.), *summarily aff'g*, 383 F. Supp. 1287 (D. N.H. 1974).

304. *Chimento v. Stark*, 414 U.S. 802 (1973) (mem.), *summarily aff'g*, 353 F. Supp. 1211 (D. N.H. 1973).

305. 505 U.S. 1 (1992). *See infra* notes 421-37 and accompanying text for further discussion of this case.

306. *Id.* at 12-13.

307. *Id.* at 39 (Stevens, J., dissenting).

308. *Williams v. Vermont*, 472 U.S. 14 (1985); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985).

309. *See Metropolitan Life*, 470 U.S. at 884 (O'Connor, J., dissenting).

facts.

In *Metropolitan Life Insurance Co. v. Ward*,³¹⁰ the Court reviewed an Alabama statute that taxed the gross premiums of out-of-state insurance companies at a higher rate than those of domestic insurance companies.³¹¹ Foreign insurers could reduce the differential somewhat by investing a certain percentage of their worldwide assets in Alabama.³¹² The purposes of the statute as identified by the state court were to encourage the formation of new domestic insurance companies in Alabama and to encourage capital investment in Alabama assets and securities by foreign insurance companies.³¹³

The Supreme Court began its analysis by stating that the appropriate standard to review classifications that imposed more onerous taxes on foreign corporations than domestic corporations was that "the discrimination between foreign and domestic corporations [must bear] a rational relation[ship] to a legitimate state purpose."³¹⁴ The Court then went on to hold that both purposes advanced by the different treatment were impermissible.³¹⁵ However, what could possibly be the matter with the promotion of domestic industry as a state purpose?

The Court's answer was that Alabama was attempting to promote the business of domestic insurers "by penalizing foreign insurers who also want to do business in the State."³¹⁶ But this answer is a conclusion without analysis or explanation. Even the Court had to concede that "a State's goal of bringing in new business is legitimate and often admirable."³¹⁷ For a long time, state and local governments have promoted business through such devices as tax exemptions, tax abatements, subsidized loans, preparation of infrastructure such as roads and sewers, and the relaxation of zoning restrictions. Certainly, as argued by the State of Alabama, a favorable insurance tax rate would also promote the domestic insurance industry. Nevertheless, the problem seems to be that the State has provided the favorable rate *only* for domestic insurers while imposing a higher rate on foreign insurers. According to the Court, the State has to treat all insurers the same.

Yet, are not domestic and foreign insurers different from each other in ways that are relevant to the state? Justice O'Connor, writing for the four dissenters in *Metropolitan Life*, demonstrated that the two were in fact quite different for the state's purposes. Alabama's domestic insurance companies were typically quite different from their multistate competitors. The foreign insurers offered standardized national policies to "affluent, high volume, urban markets."³¹⁸ The

310. 470 U.S. 869 (1985).

311. *Id.* at 871-72.

312. *See id.* at 872.

313. *Id.* at 873.

314. *Id.* at 875 (citing *Western & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 667-68 (1981)).

315. *Id.* at 883.

316. *Id.* at 877.

317. *Id.* at 879.

318. *Id.* at 887 (O'Connor, J., dissenting).

domestic insurers were far more likely to write low-cost policies and to serve rural areas.³¹⁹ It was easier for Alabama to regulate and insure the solvency of domestic insurers than it was to do the same for out-of-state entities.³²⁰ Thus, the two kinds of insurers were in fact quite different in relation to Alabama's attempt to "promote the public welfare."³²¹ As with any classification, the effect of Alabama's differing tax rates on insurance companies was that some were benefitted and some burdened. However, so long as the purpose of the law is to promote a public good, the incidental benefits and burdens are not ordinarily thought to create any equal protection difficulties.

A further problem with the majority's opinion, which Justice O'Connor noted, was its failure to explain adequately the effect of the McCarran-Ferguson Act³²² on its holding in *Metropolitan Life*. That Act had exempted the insurance industry from the Commerce Clause, in large measure because of the recognition that the insurance industry has a significant local component.³²³ The exemption was due to the Congressional understanding both that local insurers are more responsive to local conditions and that state regulators are better able to respond to the different needs of particular states.³²⁴ Although *Metropolitan Life* was not a Commerce Clause case, the majority did not adequately explain why the promotion of the domestic insurance industry, which Congress had approved as appropriate under the Commerce Clause, was now impermissible under the Equal Protection Clause.

Just four years earlier, in *Western & Southern Life Insurance Co. v. State Board of Equalization*,³²⁵ the Court approved California's retaliatory tax on out-of-state insurance companies. Domestic insurers and some out-of-state insurers were charged one rate while out-of-state insurers incorporated in states that charged higher taxes on California insurers were charged a higher rate.³²⁶ In upholding this tax, the Court stated that "[t]here can be no doubt that promotion of domestic industry by deterring barriers to interstate business is a legitimate state purpose."³²⁷ Justice O'Connor, writing for the dissent in *Metropolitan Life*, did not think that there was a substantive difference between the taxes in the two cases. According to Justice O'Connor, the state can impose unequal burdens on foreign insurers "if the State's purpose is to foster its domestic insurers' activities in *other* States," but a similarly unequal burden is impermissible "when employed to further a policy that places a higher social value on the domestic insurer's *home State* than interstate activities."³²⁸ For Justice O'Connor, the

319. See *id.*

320. See *id.* at 888.

321. *Id.*

322. 15 U.S.C. § 1011-1015 (1994).

323. See *Metropolitan Life*, 470 U.S. at 889 (O'Connor, J., dissenting).

324. See *id.* (citations omitted).

325. 451 U.S. 648 (1981).

326. See *id.* at 649-50.

327. *Id.* at 671.

328. *Metropolitan Life*, 470 U.S. at 899-900 (O'Connor, J., dissenting).

majority had “engraft[ed] its own economic values on the Equal Protection Clause.”³²⁹

Three months after *Metropolitan Life*, in June of 1985, the Court decided *Williams v. Vermont*,³³⁰ another case involving a tax preference for residents over nonresidents. Vermont imposed a use tax on residents when cars were registered. The tax was not imposed if the car had been purchased in Vermont and a sales tax had been paid at that point nor if a sales or use tax had been paid in another state if the person registering the car had been a Vermont resident when paying the tax.³³¹ The plaintiffs purchased cars outside of Vermont and paid sales taxes to other states but had not been Vermont residents when paying the taxes and therefore were not allowed a credit for those payments.³³² The Vermont Supreme Court upheld the tax because it was “rationally related to the legitimate state interest in raising revenue to maintain and improve the highways, and rationally placed the burden on those who used them.”³³³ The U.S. Supreme Court’s analysis began by announcing that States have “large leeway”³³⁴ to make tax classifications which will be upheld “if the legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose.”³³⁵ Although this appeared to be a deferential standard, the Court concluded that the different treatment of residents and nonresidents did not further any legitimate purpose.³³⁶ The Court made the surprising, and ultimately insupportable, claim that “[a] State may not treat those within its borders unequally solely on the basis of their different residences or States of incorporation.”³³⁷

For the Court, the statutory classification that makes residence at time of purchase the relevant factor “is a wholly arbitrary basis on which to distinguish among present Vermont registrants.”³³⁸ All Vermont registrants are similarly situated with respect to the purpose of maintaining and improving the roads in Vermont and of having those who use the roads pay for them.³³⁹ “The distinction

329. *Id.* at 900.

330. 472 U.S. 14 (1985).

331. *See id.* at 15.

332. *See id.* at 16.

333. *Id.* at 17 (citing *Williams v. State*, 478 A.2d 993 (Vt. 1984)). *Williams* was a summary decision that cited as controlling *Levenson v. Conway*, 481 A.2d 1029 (Vt. 1984), *appeal dismissed*, 469 U.S., 926 (1984), a companion case to *Williams*. A decision in the *Levenson* case was handed down the same day.

334. *Metropolitan Life*, 472 U.S. at 22 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973)).

335. *Id.* at 22-23 (quoting *Exxon Corp. v. Eagerton*, 462 U.S. 176, 196 (1983)).

336. *Id.* at 23.

337. *Id.* (citing *WHYY v. Glassboro*, 393 U.S. 117, 119 (1968); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 571-72 (1949)).

338. *Id.*

339. *See id.* at 23-24.

between [resident and nonresident] bears no relation to the statutory purpose.”³⁴⁰ With regard to the policy of paying for the use of roads, it might be appropriate to impose the use tax on those in plaintiffs’ position, who would be using Vermont’s roads. Yet, if that is true, there is no reason not to impose the tax on those who were Vermont residents at the time of their out-of-state purchase, who would also be using Vermont’s roads.

According to Justice Blackmun, in his dissent joined by Justices Rehnquist and O’Connor, Vermont’s use tax system “worked exactly as it was intended to work.”³⁴¹ “Each [of the parties] used his or her car in two States, and each paid two States’ use or sales taxes.”³⁴² The majority had not accorded the tax statute the deference to which it was entitled under the Equal Protection Clause, but rather subjected it “to a kind of microscopic scrutiny that few enactments could survive.”³⁴³ Most surprising of all, the majority found unconstitutional the allegedly different treatment of the plaintiff and some “hypothetical Vermonter” who received better treatment.³⁴⁴ That “phantom beneficiary” of the discrimination against Williams probably did not exist.³⁴⁵

Even if such a person as hypothesized did exist, according to Justice Blackmun, the differing treatment would be justified. It is not irrational to presume that “people will use their cars primarily in the States in which they reside.”³⁴⁶ This statutory presumption, which is surely correct in the vast majority of cases, establishes a classification that is closely correlated with the purpose of assessing road taxes on those who use the roads. The fact that the classification might not fit perfectly with the purpose—that Williams may not use his car primarily in the state in which he resided at the time of purchase—is not ordinarily considered to be a problem under rational basis review.

Metropolitan Life and *Williams* may appear to suggest that the Court has a new-found antagonism toward any state classification that disadvantages nonresidents in any way. This would be surprising in a federal system that recognizes the principle of state sovereignty.³⁴⁷ State residence must mean something or the state would simply be an administrative department of the federal government. In fact, the Court has often recognized the legitimacy of a

340. *Id.* at 24.

341. *Id.* at 30 (Blackmun, J., dissenting).

342. *Id.*

343. *Id.* at 31.

344. *Id.* at 32.

345. *See id.* at 31.

346. *Id.* at 34.

347. *See, e.g., Zobel v. Williams*, 457 U.S. 55, 68 (1982) (Brennan, J., concurring).

Through these means, one State may attract citizens of other States to join the numbers of its citizenry. That is a healthy form of rivalry: It inheres in the very idea of maintaining the States as independent sovereigns within a larger framework, and it is fully—indeed necessarily—consistent with the Framers’ further idea of joining these independent sovereigns into a single Nation.

state's preferences for its own residents over nonresidents. The state may reserve its public schools for state residents,³⁴⁸ limit lower university tuition to residents,³⁴⁹ establish a residency requirement for certain jobs,³⁵⁰ impose a longer, more onerous statute of limitations on out-of-state corporations,³⁵¹ and impose more onerous requirements on nonresidents who want to obtain a hunting license.³⁵²

Even in the same term in which it was deciding *Metropolitan Life* and *Williams*, the Court also decided *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*,³⁵³ a case in which the Court was far more tolerant of a preference for the home team. In that case, Massachusetts and Connecticut, as authorized by federal banking law, enacted laws that permitted out-of-state banks to acquire in-state banks, but only if the out-of-state bank had its principal place of business in one of the other New England States.³⁵⁴ This appeared to be discrimination against non-New England banks.

The Court distinguished its recent decision in *Metropolitan Life*. While the statute in that case favored in-state insurers by discriminating against out-of-state insurers, the statute in *Northeast Bancorp*, according to the Court, did not favor local corporations at the expense of out-of-state corporations.³⁵⁵ Rather, the law favored "out-of-state corporations domiciled within the New England region over out-of-state corporations from other parts of the country."³⁵⁶ Since banking has always been "of profound local concern,"³⁵⁷ one state legislature considered "interstate banking on a regional basis to combine the beneficial effect of increasing the number of banking competitors with the need to preserve a close relationship between those in the community who need credit and those who provide credit."³⁵⁸ Thus, the statute satisfied the traditional rational basis test. Justice O'Connor, concurring, was unable to see the difference between the forbidden preference for a "state 'home team'" in *Metropolitan Life* and the acceptable preference for a "regional 'home team'" in *Northeast Bancorp*.³⁵⁹ Furthermore, like banking, insurance has been considered to be of particularly local concern.³⁶⁰ *Metropolitan Life* was not so much distinguished as ignored.

Within the next few years, the Court would follow the lead of *Northeast*

348. See *Martinez v. Bynum*, 461 U.S. 321 (1983).

349. See *Vlandis v. Kline*, 412 U.S. 441 (1973).

350. See *McCarthy v. Philadelphia Civil Serv. Comm'n*, 424 U.S. 645 (1976).

351. See *G. D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982).

352. See *Baldwin v. Fish and Game Comm'n*, 436 U.S. 371 (1978).

353. 472 U.S. 159 (1985).

354. *Id.* at 164.

355. *Id.* at 177.

356. *Id.*

357. *Id.* (citing *Lewis v. B.T. Inv. Managers, Inc.*, 447 U.S. 27, 38 (1980)).

358. *Id.* at 177-78 (citing Report to the General Assembly of the State of Connecticut (Jan. 5, 1983), 4 App. in No. 84-4074 (CA2) at 1239-41).

359. *Id.* at 179 (O'Connor, J., dissenting).

360. See *id.*

Bancorp rather than *Metropolitan Life* and *Williams*. In 1992, the Court rejected an equal protection challenge to a Montana venue statute that made it easier for plaintiffs to sue an out-of-state corporation than one incorporated in Montana.³⁶¹ In 1997, the Court rejected an equal protection challenge to an Ohio statute that effectively exempted domestic utility companies from the general sales and use taxes that were imposed on the sale of natural gas by other, frequently out-of-state, entities.³⁶² *Metropolitan Life* and *Williams* are still on the books, but they do not appear to have much influence on the business of the Court today.

F. Different Treatment for the Mentally Retarded

Also during 1985, a fourth rational basis claim was successful. In *City of Cleburne v. Cleburne Living Center*,³⁶³ the city denied a special use permit for the operation of a group home for the mentally retarded. In the lawsuit that followed, the Court of Appeals for the Fifth Circuit held that mental retardation is a quasi-suspect class that would be subject to intermediate scrutiny.³⁶⁴ Because the ordinance that authorized the permit refusal and the permit refusal itself did not satisfy that standard, the court of appeals held the ordinance was invalid on its face and as applied.³⁶⁵

On appeal, the Supreme Court concluded that the mentally retarded were not a quasi-suspect class,³⁶⁶ thus, the proper standard of review was the traditional one, that the different treatment of the mentally retarded “must be rationally related to a legitimate governmental purpose.”³⁶⁷ However, as both members of the Court and commentators have pointed out, the Court then went on to apply a very demanding, non-traditional version of rationality review.³⁶⁸

361. *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648 (1992).

362. *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997).

363. 473 U.S. 432 (1985).

364. *Cleburne Living Ctr., Inc. v. City of Cleburne*, 726 F.2d 191 (5th Cir. 1984), *aff'd in part and vacated in part*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

365. *Id.* at 220.

366. *Cleburne*, 473 U.S. at 442-46.

367. *Id.* at 446.

368. *Id.* at 458 (Marshall, J., dissenting).

[T]he Court's heightened scrutiny discussion is even more puzzling given that Cleburne's ordinance is invalidated only after being subjected to precisely the sort of probing inquiry associated with heightened scrutiny. To be sure, the Court does not label its handiwork heightened scrutiny, and perhaps the method employed must hereafter be called 'second order' rational basis review rather than 'heightened scrutiny.'

Id. One commentator noted:

The most obvious case for heightened judicial scrutiny is governmental action which, on its face, distinguishes between the disabled and the nondisabled to the detriment of the former. Yet, in one case of facial discrimination against the disabled, the Supreme Court resisted the explicit application of heightened scrutiny, although the Court

The Court used several non-deferential techniques. Specifically, the Court's analysis moved back and forth between rejecting purposes as impermissible, and rejecting as inadequate or nonexistent the connection between the differing treatment of the mentally retarded and an alleged, permissible purpose. The Court first decided that it was impermissible to give effect to the negative attitudes and fears of the neighbors who did not want a group home for the mentally retarded in their neighborhood.³⁶⁹ The Court explained that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."³⁷⁰ Likewise, it was also impermissible to give effect to concern about harassment from junior high school students across the street as a reason to deny the permit.³⁷¹

Concern about building a group home on a flood plain was clearly legitimate, but the classification of the mentally retarded was completely unrelated to that concern since the mentally retarded were similarly situated with everyone else who was living in the flood plain.³⁷² Concerns about legal responsibility for the actions of those living in the group home were also legitimate, but the classification was not related to that purpose because the mentally retarded were, once again, similarly situated with regard to this purpose with all other occupants of group homes in the area, including boarding houses and fraternities.³⁷³ Concerns about the size of the home and the number of people living in it were appropriate, but since the facility would comply with existing zoning rules with regard to size and number, there was no rational relationship between one's status as mentally retarded and these concerns.³⁷⁴ Concerns about the concentration of population, congestion in the streets, fires, neighborhood serenity, and avoidance of danger to other residents were all legitimate, but the mentally retarded once again were no different from anyone else with regard to these concerns.³⁷⁵ Finally, the Court concluded that, because the classification was not at all related to any of the purported purposes, the permit refusal must have been based on "an irrational prejudice against the mentally retarded."³⁷⁶

The Court in its opinion indicated that "this record does not clarify how . . . the characteristics of the intended occupants of the [group] home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes."³⁷⁷ Of course, traditional

apparently applied heightened review in the guise of minimum rationality.

LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-31, at 1594-95 n.20 (2d ed. 1988) (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985)).

369. *Cleburne*, 473 U.S. at 448.

370. *Id.* (quoting *Palmore v. Sidoti*, 446 U.S. 429, 433 (1984)).

371. *See id.* at 449.

372. *See id.*

373. *See id.*

374. *See id.* at 449-50.

375. *See id.* at 450.

376. *Id.*

377. *Id.*

rationality does not demand evidence in the record to support governmental judgments, and ordinarily the Court does not reject all of the proffered purposes only to conclude that the actual purpose is one the Court has identified on its own.

After *Cleburne*, it may have appeared that discrimination against the mentally retarded was a subject to which the Court would give heightened scrutiny. Subsequent case law, however, did not bear out this prediction. Eight years later, in the 1993 case, *Heller v. Doe*,³⁷⁸ the Court upheld a classification that disadvantaged the mentally retarded; in doing so, the Court used an extremely deferential standard of review and virtually ignored *Cleburne*.

Heller involved the statutory procedures for involuntary civil commitment in Kentucky. Under the statute, it was easier to commit a mentally retarded person than it was to commit a person who was mentally ill. The proceedings for both kinds of commitment were substantially similar with two exceptions. The burden of proof for involuntary commitment based on mental retardation was "clear and convincing evidence" while the standard for commitment based on mental illness was "beyond a reasonable doubt."³⁷⁹ Second, in commitment proceedings for mental retardation, but not for mental illness, guardians and immediate family members were allowed to participate as parties.³⁸⁰ A group of mentally retarded persons who had been involuntarily committed challenged these rules as a violation of equal protection. The district court agreed with the plaintiffs, citing, *inter alia*, *Cleburne*, as mandating that "mentally retarded persons be afforded the same protections as are mentally ill persons when facing involuntary commitment."³⁸¹ The Supreme Court reversed.

Justice Kennedy's opinion for the majority began with a survey of Supreme Court cases on rationality review that set forth the most deferential version of the standard. Rational basis review was "'not a license for courts to judge the wisdom, fairness, or logic of legislative choices.'"³⁸² Classifications not involving fundamental rights or suspect lines are "accorded a strong presumption of validity,"³⁸³ and will be upheld "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose."³⁸⁴ The legislature "need not 'actually articulate at any time the purpose or rationale supporting its classification'" which "'must be upheld . . . if there is any reasonably conceivable set of facts that could provide a rational basis for the classification.'"³⁸⁵ Furthermore, a state was under "no obligation to produce

378. 509 U.S. 312 (1993).

379. *Id.* at 314-15.

380. *See id.* at 315.

381. *Doe v. Cowherd*, 770 F. Supp. 354, 358 (W.D. Ky. 1991), *rev'd sub nom.*, *Heller v. Doe*, 509 U.S. 312 (1993).

382. *Heller*, 509 U.S. at 319 (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)).

383. *Id.*

384. *Id.* at 320.

385. *Id.* (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992); *Beach Communications*, 508

evidence to sustain the rationality of a statutory classification,” which ““may be based on rational speculation unsupported by evidence or empirical data.””³⁸⁶ Rather, ““the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.””³⁸⁷

The claim of discrimination against the mentally retarded in *Heller* was, at least on its face, quite similar to the claim of discrimination in *Cleburne*. Yet the Court cited *Cleburne* only once and purported to find in *Cleburne* the same rational basis standard it was using in *Heller*.³⁸⁸ That assumed similarity is obviously incorrect. The rational basis review in *Heller* bears very little similarity to the rational basis review in *Cleburne*. The Court in *Cleburne* looked for evidence in the record to support the assertions of purpose and to demonstrate the relationship between classification and purpose.³⁸⁹ The Court in *Cleburne* independently evaluated the evidence of means and purpose and was quite willing to reject the asserted purposes because they were unsupported by the evidence.³⁹⁰ Finally, the Court in *Cleburne* was willing to identify for itself the true purpose of the statute, a purpose that the state had never identified and which it undoubtedly would contest.³⁹¹

Once the Court in *Heller* had identified the extremely deferential standard that it was going to use, the analysis came easily. The lower standard of proof for commitment of the mentally retarded was justified, according to the Court, first, because mental retardation is easier to diagnose than mental illness, and second, because a finding of danger to the community is easier to establish for the mentally retarded.³⁹² For the Court, this was sufficient because there was a ““reasonably conceivable set of facts”” from which the state could make these conclusions.³⁹³ In addition, the Court also found a third justification for the distinction, that the treatment of the mentally retarded who are committed is much less invasive than is the treatment for those who are committed as mentally ill.³⁹⁴ As for the involvement of guardian and family members as parties to the proceedings, the state “may have concluded” that family members have known the retarded person for many years and may have valuable insights that will help the commitment process.³⁹⁵

U.S. at 313).

386. *Id.* (quoting *Beach Communications*, 508 U.S. at 315).

387. *Id.* (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

388. *Id.* at 321 (“We have applied rational-basis review in previous cases involving the mentally retarded and the mentally ill. . . . In neither case did we purport to apply a different standard of rational-basis review from that just described.”) (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985)).

389. *Cleburne*, 473 U.S. at 450.

390. *Id.* at 449-50.

391. *Id.* at 450.

392. *Heller*, 509 U.S. at 322-23.

393. *Id.* at 323 (quoting *FCC v. Beach Communications*, 508 U.S. 307, 313 (1993)).

394. *Id.* at 324.

395. *Id.* at 328-29.

In an opinion written by Justice Souter, four dissenting Justices strongly disagreed. They would have found *Cleburne* to be a far more controlling precedent. Justice Souter commented that although the majority had cited *Cleburne* only once, and did not purport to overrule it, neither did the majority apply it.³⁹⁶ Thus, “at the end of the day *Cleburne*’s status is left uncertain.”³⁹⁷ Justice Souter indicated that he would follow *Cleburne* in this case.³⁹⁸

Justice Souter began by conceding that there are differences between the mentally ill and the mentally retarded³⁹⁹ but that concession did not resolve the equal protection issue. The question was whether those differences justified the different treatment in the Kentucky civil commitment statute.⁴⁰⁰ The majority approved a lesser standard of proof for commitment of the mentally retarded because mental retardation was supposed to be easier to diagnose.⁴⁰¹ Justice Souter insisted that the majority thereby “misunder[stood] the principal object in setting burdens.”⁴⁰² A higher standard of proof is generally imposed, “not to reflect the mere difficulty of avoiding error, but the importance of avoiding it.”⁴⁰³ By this measure, the differing standards of proof made no sense unless the state placed a higher value on the liberty of one group, the mentally ill, and a correspondingly lower value on the liberty of the mentally retarded. The state of course made no such claim and the Court clearly would have rejected it. For Justice Souter, the lesser standard was simply discrimination against the retarded.⁴⁰⁴

Justice Souter also took issue with the majority’s conclusion that “it would have been plausible for the Kentucky Legislature to believe that most mentally retarded individuals who are committed receive treatment that is . . . less invasive tha[n] that to which the mentally ill are subjected.”⁴⁰⁵ The majority had cited nothing that would demonstrate that such a belief was plausible.⁴⁰⁶ Justice Souter himself cited a substantial body of literature that indicated that the belief was false.⁴⁰⁷ Since there was “nothing in the record” to indicate that Kentucky’s institutions were any different from the common practices that he had cited, Justice Souter would have found no adequate basis for the legislature’s

396. *Id.* at 337 (Souter, J., dissenting).

397. *Id.*

398. *Id.*

399. *Id.*

400. *See id.* at 337-38.

401. *Id.* at 339.

402. *Id.*

403. *Id.*

404. *Id.* at 341 (noting that even if the asserted degrees of difficulty in proving mental retardation and mental illness were true, “it lends not a shred of rational support to the decision to discriminate against the retarded in allocating the risk of erroneous curtailment of liberty”).

405. *Id.* at 341-42.

406. *Id.* at 342.

407. *Id.* at 342-43.

conclusions.⁴⁰⁸ With regard to the involvement of family members and guardians in the proceedings for the mentally retarded, Justice Souter could find no justification for the distinction that created, only against the mentally retarded, a second advocate for institutionalization.⁴⁰⁹

Ultimately, as the Court did in *Cleburne*, Justice Souter was unable to credit the purported justifications advanced by the state. He considered them implausible. What was really at work in the statute was discrimination against the mentally retarded, a devaluing of their liberty and a lesser concern with its loss, and the validation of a stereotypical assumption that the retarded are "perpetual children."⁴¹⁰ For Justice Souter, *Cleburne* should have controlled, both in its result and in its analysis. The fact that the majority ignored it suggests that the case has been limited to its facts and that there is little left of it by way of precedent.

G. Disparity in Property Tax Assessments

After deciding *Cleburne* in 1985, the Court retired for four years from the business of heightened rationality. Then in 1989, the Court returned to that form of analysis in two cases, one invalidating a tax assessment scheme and the other invalidating a restriction on eligibility for public office. In the first of these, *Allegheny Pittsburgh Coal Co. v. County Commission*,⁴¹¹ the Court reviewed differing tax assessments of real property in Webster County, West Virginia. The tax assessor had based assessments on the most recent purchase price of a given piece of property.⁴¹² Because of the effects of inflation over time, properties that had been sold recently were assessed at much higher levels than properties that had remained with one owner for a long time. The plaintiff in the case, Allegheny Pittsburgh Coal, was assessed at a level thirty-five times the level applied to owners of comparable property.⁴¹³

Writing for a unanimous Court, Justice Rehnquist identified the plaintiff's equal protection complaint as a comparative one: Even though Allegheny Pittsburgh did not have an independent substantive right to any particular level of taxation, it complained that, in comparison with its neighbors, its property was grossly overassessed.⁴¹⁴ The Court indicated that the state's powers to impose and collect taxes were broad; as long as the different treatment of taxpayers was "neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of equal protection of the law."⁴¹⁵ The county argued that its assessment scheme was "rationally related to its purpose

408. *Id.* at 344.

409. *Id.* at 346-47.

410. *Id.* at 348.

411. 488 U.S. 336 (1989).

412. *See id.* at 338.

413. *Id.* at 341.

414. *See id.* at 342.

415. *Id.* at 344 (quoting *Brown-Forman Co. v. Kentucky*, 217 U.S. 563, 573 (1910)).

of assessing properties at true current value.”⁴¹⁶ In the county’s view, the use of acquisition value was reasonable evidence of market value. For properties recently purchased, acquisition cost was the best evidence of value. As this information grew old, it would be less accurate. However, because of the time and expense that would be required to conduct regular field assessments of every property in the county, the acquisition value scheme was reasonable, according to the county. The Court rejected this claim even though it “did not intend to cast doubt upon the theoretical basis of such a scheme.”⁴¹⁷ Yet, according to the Court, the Webster County assessor on her own had adopted an assessment scheme inconsistent with the state requirement that all property in the state should be assessed at a uniform rate according to its estimated market value.⁴¹⁸

The Court’s opinion was brief, unanimous, and problematic. There was little analysis in the opinion, not much more than the conclusion that relative undervaluation of comparable property denies equal protection of the law.⁴¹⁹ The Court said that it would not cast doubt on the theoretical basis of the scheme that used past purchase price as evidence of current value, but then invalidated the scheme because of the manner in which it operated in Webster County. Ordinarily in rational basis cases the Court does not demand evidence to show that the classification is in fact rationally related to its purpose, only that the government could reasonably have believed it to be. Further, although the Court decided the case as one involving the Equal Protection Clause, the Court suggested at one point that the real problem in the case was that the county tax assessor’s practice was “contrary to that of the guide published by the West Virginia Tax Commission.”⁴²⁰ Ordinarily, it is not the province of the Supreme Court to provide the definitive interpretation of the state tax assessor’s guide.

Like the other successful rational basis cases discussed earlier, *Allegheny Pittsburgh Coal* could have been a harbinger of a much closer scrutiny of tax cases and a greater intolerance of the comparative inequities that result from arbitrary decisions. But it was not to be. Just three years later, in *Nordlinger v. Hahn*,⁴²¹ the Court reviewed a very similar set of facts and effectively distinguished *Allegheny Pittsburgh Coal* out of existence.

In *Nordlinger*, the Court considered California’s Proposition 13, an amendment to the state constitution that sets limits on property taxes. Under the amendment, real property taxes must not exceed one percent of a property’s market value, a value that was to be reappraised only when property changed hands.⁴²² Because real estate values were escalating rapidly in California,⁴²³ the effect of this provision was that homeowners who had been living in their homes

416. *Id.* at 343.

417. *Id.*

418. *Id.* at 345.

419. *Id.* at 346.

420. *Id.* at 345.

421. 505 U.S. 1 (1992).

422. *See id.* at 5.

423. *See id.* at 6.

for a long time had much lower property tax bills than their neighbors who had acquired their homes more recently. The plaintiff in *Nordlinger*, who had purchased her home recently, owed property taxes of \$1701, while a long-established neighbor in a very similar house owed only \$358 for the same year.⁴²⁴ The facts looked a lot like those in *Allegheny Pittsburgh Coal*.

The Court announced a deferential standard of review, “whether the difference in treatment between newer and older owners rationally furthers a legitimate state interest.”⁴²⁵ This standard would be satisfied “so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decision maker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.”⁴²⁶

Applying this deferential standard, the Court identified two purposes underlying the acquisition value assessment scheme of Proposition 13. These were, first, local neighborhood preservation, continuity, and stability, and second, the protection of the reliance and expectation interests of existing property owners.⁴²⁷ Rapid turnover in ownership would be discouraged if long-term owners paid progressively less in property taxes than newer owners.⁴²⁸ Also, existing owners had vested expectations about the level of property taxes that were more deserving of protection than the anticipatory expectations of those who had not yet purchased a home.⁴²⁹

The petitioners in the case, not surprisingly, argued that *Allegheny Pittsburgh Coal* required invalidation of Proposition 13. Both cases involved dramatic disparities in the taxation of properties of comparable value because property was assessed at its acquisition value. However, the Court purported to find “an obvious and critical factual difference”⁴³⁰ between the two cases. In *Allegheny Pittsburgh Coal*, there was no indication “that the policies underlying an acquisition-value taxation scheme could conceivably have been the purpose for the Webster County tax assessor’s unequal assessment scheme.”⁴³¹ Thus, for the Court, *Allegheny Pittsburgh Coal* “was the rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme.”⁴³²

The Court in *Nordlinger* apparently thought that at least part of “the critical factual difference” between the two cases was that in *Nordlinger*, the acquisition

424. See *id.* at 6-7.

425. *Id.* at 11.

426. *Id.* (citations omitted).

427. See *id.* at 12-13.

428. See *id.* at 12.

429. *Id.* at 12-13 (“In short, the State may decide that it is worse to have owned and lost, than never to have owned at all.”).

430. *Id.* at 14.

431. *Id.* at 15.

432. *Id.* at 16.

value assessment scheme had been enacted in a state constitution, while in *Allegheny Pittsburgh Coal*, it was the local assessor who made use of acquisition value as evidence of current market value.⁴³³ But this distinction does not stand up to close inspection. In California, Proposition 13 required that property taxes be based on “full cash value” of real property and then defined “full cash value” in most cases as the acquisition value.⁴³⁴ Similarly, in West Virginia, the state constitution required that property be taxed “in proportion to its value,”⁴³⁵ and the local assessor used acquisition value as an appropriate measure of “true and actual value.”⁴³⁶ It appears that for the Court, the de jure discrimination set out in the California Constitution is constitutionally different from the de facto discrimination perpetrated by a local assessor in West Virginia. Justice Stevens, dissenting, argued otherwise, that the Equal Protection Clause prohibits “intentional and arbitrary discrimination whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.”⁴³⁷

It is quite clear that, under traditional rational basis review, the use of acquisition value to measure market value is not wholly irrational. There is certainly some correlation between acquisition value and market value. The relationship is closer when properties are turned over frequently and inflation is low. It is less accurate when properties are held for a long time and there is substantial inflation in the real estate market. Although acquisition value may not be the best measure of current market value, rational basis review does not require the state to use the most efficient means of achieving its ends. In any case, the Court never adequately distinguished *Allegheny Pittsburgh Coal* from *Nordlinger*, nor could it have done so. The effect of *Nordlinger*, the later of the two cases, is to limit *Allegheny Pittsburgh Coal* to its very narrow set of facts. It is thus unlikely that *Allegheny* will be a significant precedent for the future.

H. Restrictive Qualifications For Public Office

Also in 1989, in *Quinn v. Millsap*,⁴³⁸ the Court used rational basis review to invalidate a restrictive qualification for appointment to a county board. The restriction at issue was a provision of the Missouri state constitution under which a “board of freeholders” was empowered to propose a reorganization plan for the City of St. Louis and St. Louis County.⁴³⁹ It was the makeup of this board that raised the equal protection issue because its membership was limited to those

433. *Id.* at 14-15.

434. *See id.* at 5 (citing CAL. CONST. art. XIII A, § 2(a)).

435. *Allegheny Pittsburgh Coal Co. v. County Comm’n*, 488 U.S. 336, 338 (1989) (quoting W. VA. CONST. art. X, § 1).

436. *Id.* at 342 (quoting *In re 1975 Tax Assessments Against Oneida Coal Co.*, 360 S.E.2d 560, 564 (W. Va. 1987), *rev’d*, *Allegheny Pittsburgh Coal*, 488 U.S. at 336).

437. *Nordlinger*, 505 U.S. at 31-32 (Stevens, J., dissenting) (quoting *Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350, 352-53 (1918)).

438. 491 U.S. 95 (1989).

439. *Id.* at 96 (citing MO. CONST. art. VI, § 30).

who owned real property.⁴⁴⁰ The Court had previously considered similar challenges to property qualifications for voting and had invalidated them using strict scrutiny because the qualification infringed on the fundamental right to vote.⁴⁴¹ In *Quinn*, the Court determined that it did not need to consider the argument for heightened scrutiny because, according to the Court, the property qualification could not even satisfy rational basis review.⁴⁴²

The Court reviewed and rejected the two justifications advanced in support of the property qualification. The first was that owners of real estate had a "first-hand knowledge of the value of good schools, sewers systems, and the other problems and amenities of urban life."⁴⁴³ The second justification was that real property owners had "a tangible stake in the long term future of [the] area."⁴⁴⁴ The Court found that the property qualification did not have any adequate correlation with either of these justifications. With regard to the first claim, it is clear that some who do not own real property are knowledgeable about urban issues and have a long-term stake in the area, while, at the same time, some property owners are ignorant of local government issues.⁴⁴⁵ With regard to the second justification, many long-term residents would have substantial attachments to the community even though they did not own property, while not all property owners had a long-term attachment to the community.⁴⁴⁶

These are obviously problems of overinclusion and underinclusion. If the Court were truly deferential, these problems would not have resulted in the invalidation of the "freeholding" requirement. There is surely some truth to the claim that property owners as a class are more likely than those without property to have been part of the community for a long time. But, for the most part, property qualifications are a relic of an earlier, more socially stratified age that has been left behind. The Court generally has been intolerant of them.⁴⁴⁷ There have been a small number of cases involving property qualifications that the Court upheld using rational basis review,⁴⁴⁸ but arguably they are distinguishable

440. There was some dispute during the course of litigation as to whether the term "freeholder" meant a person who owned real property. *See id.* at 99-100. The Supreme Court's opinion assumed that "freeholder" meant "real property owner." *Id.* at 100-01.

441. *See, e.g.,* *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969).

442. *Quinn*, 491 U.S. at 107. In determining the appropriate standard of review, the Court cited *Turner v. Fouche*, 396 U.S. 346 (1970), where the Court, using rational basis review, invalidated a requirement that school board members own real property. *Quinn*, 491 U.S. at 107 n.10.

443. *Quinn*, 491 U.S. at 107 (quoting Br. for Appellees at 41).

444. *Id.*

445. *See id.* at 108.

446. *See id.*

447. *See, e.g.,* *Phoenix v. Kolodziejski*, 399 U.S. 204 (1970); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969); *Cipriano v. City of Houma*, 395 U.S. 701 (1969).

448. *Ball v. James*, 451 U.S. 355 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973); *Associated Enter. Inc. v. Toltec Watershed Improvement Dist.*, 410 U.S. 743 (1973).

from *Quinn*. Those cases involved property qualifications to vote in elections for governmental entities with very limited functions, all of which were related to the distribution of water. Significantly, all the water delivered was distributed according to land ownership. The board in *Quinn*, on the other hand, could exercise the very broad authority to draft a plan to reorganize the entire governmental structure of the city and the county. Such a plan would affect all citizens, not just property owners, and thus the property qualification did not have an adequate connection to the purpose.

Quinn was and continues to be a little-noted opinion. It has had little influence on the Court,⁴⁴⁹ and it appears that it will have little influence on future opinions.

I. *Romer v. Evans and the Irrationality of Amendment 2*

After 1989, the Court retired once again from the business of heightened rationality for seven years. During that time, its rational basis opinions took on a tone of deference that was so extreme that it seemed quite certain that heightened rationality was henceforth of historical interest only. In two decisions from June, 1993,⁴⁵⁰ the Court announced a standard of review that was so deferential, so willing to hypothesize facts, purposes, and connections, that no statute could ever fail the announced standard. One of these cases, *Heller v. Doe*⁴⁵¹ is discussed above. In the other, *FCC v. Beach Communications, Inc.*⁴⁵² the Court considered an equal protection challenge to an FCC regulation of the cable industry.

In *Beach Communications*, the FCC had exempted from regulation certain cable facilities that served only a building or buildings under common ownership or management.⁴⁵³ It was, of course, quite clear that this equal protection claim would not be successful. It has been more than forty years since the Court has invalidated on equal protection grounds a purely business regulation, and that one case was later overruled.⁴⁵⁴ What was surprising was the breadth of the Court's opinion, its expansive discussion of how difficult it is to mount a successful rational basis challenge, and the fact that eight of the nine Justices joined in the opinion.

According to *Beach Communications*, a statutory classification in social and economic policy areas "must be upheld against equal protection challenge if

449. The Court's only subsequent reference to *Quinn* was with reference to an issue of standing. See *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. Jacksonville, Fla.*, 508 U.S. 656, 664 (1993).

450. *Heller v. Doe*, 509 U.S. 312 (1993); *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993).

451. 509 U.S. at 312.

452. 508 U.S. at 307.

453. *Id.* at 310 (citing 47 U.S.C. § 522(7)(B) (1994)).

454. See *Morey v. Doud*, 354 U.S. 457 (1957), overruled by *City of New Orleans v. Dukes*, 427 U.S. 297 (1976).

there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”⁴⁵⁵ “[T]hose attacking the rationality of the legislative classification have the burden ‘to negative every conceivable basis which might support it.’”⁴⁵⁶ Since the legislature need not articulate its reasons for enacting a statute, “it is entirely irrelevant . . . whether the conceived reason for the challenged distinction actually motivated the legislature.”⁴⁵⁷ The lack of “‘legislative facts’ explaining the distinction ‘[o]n the record’ has no significance.”⁴⁵⁸ Rather, “[a] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.”⁴⁵⁹

Notwithstanding the extraordinarily deferential language of the Court in *Beach Communications*, just three years later, the Court decided *Romer v. Evans*⁴⁶⁰ and used a very different version of rational basis review to invalidate an amendment to the Colorado Constitution. That amendment provided that neither the state nor any of its departments or subdivisions could prohibit discrimination on the basis of “homosexual, lesbian or bisexual orientation, conduct, practices, or relationships.”⁴⁶¹ The Colorado Supreme Court invalidated the amendment using strict scrutiny because the amendment infringed on a fundamental right to participate in the political process.⁴⁶² The U.S. Supreme Court affirmed the state court judgment, but based “on a rationale different from that adopted by the State Supreme Court.”⁴⁶³

The Court cited *Heller* as support for the proposition that “if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.”⁴⁶⁴ Amendment 2 failed this standard for two reasons—because it imposed a “broad and undifferentiated disability on a single named group” and because it seemed “inexplicable by anything but animus toward the class that it

455. *Beach Communications*, 508 U.S. at 313.

456. *Id.* at 315 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

457. *Id.* (citing *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980)).

458. *Id.* (citing *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992) (further citation omitted)).

459. *Beach Communications*, 508 U.S. at 315. Justice Stevens, the only Justice not to join in the majority opinion in *Beach Communications*, was of the view that the standard as stated by the majority swept too broadly, “for it is difficult to imagine a legislative classification that could not be supported by a ‘reasonably conceivable state of facts.’ Judicial review under the ‘conceivable set of facts’ test is tantamount to no review at all.” *Id.* at 323 n.3 (Stevens, J., concurring).

460. 517 U.S. 620 (1996).

461. *Id.* at 624 (quoting COLO. CONST. art. II, § 30b).

462. See *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) (determining that strict scrutiny was the appropriate standard); *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994) (affirming trial court ruling that the amendment did not serve a compelling interest).

463. *Romer*, 517 U.S. at 626.

464. *Id.* at 631 (citing *Heller v. Doe*, 509 U.S. 312, 320 (1993)).

affect[ed].”⁴⁶⁵

On the first point, the Court insisted that, even under the most deferential version of equal protection, “we insist on knowing the relation between the classification adopted and the object to be attained.”⁴⁶⁶ The Court made no mention of “any conceivable set of facts.” The Court explained further that, ordinarily, “a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.”⁴⁶⁷ The Court then explained that it is important to require that a classification have a rational relationship to an “independent and legitimate legislative end,” because this “ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.”⁴⁶⁸ Amendment 2 “identif[ied] persons by a single trait and then den[ied] them protection across the board.”⁴⁶⁹ It imposed a broad disability on gays and lesbians who were denied the right to seek aid from the government on equal terms with everyone else. This was a “denial of equal protection . . . in the most literal sense.”⁴⁷⁰

The second problem with Amendment 2 that the Court identified was that it appeared that the disadvantage was imposed, not to advance some general public good, but “out of animosity toward the class of persons affected.”⁴⁷¹ Such a purpose, under *Moreno*, is impermissible. That this was in fact the purpose was determined, in part, because the Court could not credit the two purposes that the state had offered in support of Amendment 2. These two alleged purposes were respect for freedom of association for those who have personal or religious objections to homosexuality and the state’s interest in conserving resources in order to fight discrimination against other groups.⁴⁷² According to the Court, “[t]he breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them.”⁴⁷³ Thus, the Court concluded that Amendment 2 “classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else.”⁴⁷⁴

The majority opinion in *Romer* did not cite many cases in support of its analysis.⁴⁷⁵ The result in the case is clearly consistent with, and follows directly from, the Court’s earlier decision in *Moreno*, which the Court cited,⁴⁷⁶ and

465. *Id.* at 632.

466. *Id.*

467. *Id.* (citing *City of New Orleans v. Dukes*, 427 U.S. 297 (1976)).

468. *Id.* at 633.

469. *Id.*

470. *Id.*

471. *Id.* at 634.

472. *See id.* at 635.

473. *Id.*

474. *Id.*

475. *See id.* at 636 (Scalia, J., dissenting) (noting the majority opinion’s “heavy reliance upon principles of righteousness rather than judicial holdings”).

476. *Id.* at 634-35 (citing *United States Department of Agriculture v. Moreno*, 413 U.S. 528,

Cleburne, which the Court curiously omitted. *Cleburne* would have been a particularly appropriate case to cite because it also used the technique of rejecting the state's proffered purposes as implausible and then finding itself left with the conclusion that the only remaining explanation for the classification was prejudice. Also significant are the cases on the other side of the issue that the Court did not cite. The Court made no mention of "any reasonably conceivable state of facts"⁴⁷⁷ that would support the amendment, no mention that it was "entirely irrelevant" whether the purposes that the state advanced and which the Court refused to credit actually motivated the legislature, and no mention that those attacking the amendment had the burden "to negative every conceivable basis which might support it."⁴⁷⁸

The Court did not mention *Beach Communications* at all and its only reference to *Heller* was for the noncontroversial proposition that a legislative classification will be upheld so long as it bears a rational relation to some legitimate end.⁴⁷⁹ The Court also made no effort to hypothesize any legitimate purposes that amendment might serve. Justice Scalia, in dissent, suggested an obvious possibility, the preservation of traditional sexual mores.⁴⁸⁰ This, of course, calls to mind the Court's decision in *Bowers v. Hardwick*,⁴⁸¹ in which the Court found that the promotion of morality, traditionally defined, was an adequate state purpose to support Georgia's criminalization of sodomy. The majority opinion in *Romer* made no reference to *Bowers* either. It could be argued persuasively that *Bowers* is distinguishable, in that it involved a due process rather than an equal protection claim and it was concerned with conduct rather than with orientation. However, the "any conceivable state of facts" standard from *Beach Communications* should have been enough to make the Court address the claim that the Colorado amendment was designed to promote a traditional view of morality.

The reach of *Romer* is uncertain. In months and years to come, the Court will have to decide whether the rationale of *Romer* requires it to review and invalidate rules excluding gays from the military. This issue implicates *Romer* since one of the traditional justifications that the military has given for the exclusion of gays has been that some members of the military despise and detest gays.⁴⁸² According to *Romer*, a classification that is drawn for the purpose of

534 (1973), for the proposition that "a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest").

477. See, e.g., *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

478. *Id.* at 315 (citations omitted).

479. See *supra* note 464 and accompanying text.

480. *Romer*, 517 U.S. at 651 (Scalia, J., dissenting) (characterizing the majority opinion as "frustrat[ing] Colorado's reasonable effort to preserve traditional American moral values").

481. 478 U.S. 186 (1986).

482. See, e.g., *Beller v. Middendorf*, 632 F.2d 788, 811 n.22 (9th Cir. 1980) (citing affidavit of Assistant Chief of Naval Personnel that justifies exclusion of gays from the military, in part, because: "Tensions and hostilities would certainly exist between known homosexuals and the great majority of naval personnel who despise/detest homosexuality, especially in the unique close living

disadvantaging the group burdened by the law is not legitimate.⁴⁸³ But, if previous heightened rationality cases are an indication, in the next case that comes before the Court concerning discrimination on the basis of sexual orientation, the Court will ignore *Romer*.

IV. IN SEARCH OF A PREDICTABLE PATTERN

Since the Court is ordinarily so deferential in rationality cases, what is it about the ten cases discussed in this Article that required a different kind of scrutiny and a different result? This Part considers four different attempts to answer that question. The first of these explanations examines the nature of the class disadvantaged, the second examines the nature of the government benefit that is being denied, the third looks at the political background of the Justice writing the majority opinion, and the fourth examines the method of analysis used in the case. None of these explanations turns out to be satisfactory.

Because the Equal Protection Clause is a limitation on governmental classifications, and because the Court has adopted heightened scrutiny for certain specific classifications, the obvious place to begin our inquiry is to examine the nature of the classifications affected in these ten cases. It would be plausible to assume that the groups disadvantaged would be similar to the “discrete and insular minorities” excluded from the majoritarian political process to whom the Court has already accorded a special status.⁴⁸⁴ Initially, this approach is appealing. The groups disadvantaged in these ten cases were newcomers,⁴⁸⁵ out-of-staters,⁴⁸⁶ hippies,⁴⁸⁷ undocumented aliens,⁴⁸⁸ the mentally retarded,⁴⁸⁹ non-freeholders,⁴⁹⁰ and gays.⁴⁹¹ One could identify these groups as similar in certain ways to African-Americans, legal aliens, women, and illegitimates, groups to which the Court does accord a special status. But there are problems with this analysis.

conditions aboard ships”). Since the decision in *Beller*, the military has a new policy on gays, *see* 10 U.S.C. § 654 (1994), and a different set of justifications. *See* 10 U.S.C. §§ 654(a)(8), (9), (10), (12), (13), (15) (1994).

483. *Romer*, 517 U.S. at 633.

484. *See* *United States v. Carolene Prods.*, 304 U.S. 144, 153 n.4 (1938) (suggesting for the first time that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry”).

485. *See* *Allegheny Pittsburgh Coal Co. v. County Comm’n*, 488 U.S. 336 (1989); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982).

486. *See* *Williams v. Vermont*, 472 U.S. 14 (1985); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985).

487. *See* *United States Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973).

488. *See* *Plyler v. Doe*, 457 U.S. 202 (1982).

489. *See* *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

490. *See* *Quinn v. Millsap*, 491 U.S. 95 (1989).

491. *See* *Romer v. Evans*, 517 U.S. 620 (1996).

First, we have to deal with the language of the Court itself, language that apparently rejects the notion that the nature of the class affected is a significant factor in these cases. In *Cleburne*, for example, the Court explicitly rejected the notion that the mentally retarded were a quasi-suspect class and thus entitled to heightened scrutiny.⁴⁹² In several other cases, the Court insisted that it did not need to decide the issue of heightened scrutiny, because the classification did not even survive rational basis review.⁴⁹³ And in *Romer*, the Court completely ignored the question of heightened scrutiny. The first problem is thus that the Court opinions give no indication that the nature of the class affected is relevant to the decision in the case.

But perhaps we should pay more attention to what the Court does, and less attention to what it says it is doing. By this standard, are not the groups involved in the ten cases similar to the existing suspect and quasi-suspect classifications? Even if one were to answer this question affirmatively, it still would not explain why the Court used heightened rationality in these ten cases but not others. Specifically, why were the mentally retarded treated as a quasi-suspect class in *Cleburne* but not in *Heller*? Why were out-of-staters in need of special protection in *Metropolitan Life* and *Williams* but not in *Northeast Bancorp*? What was special about newcomers in *Zobel*, *Hooper*, and *Allegheny Pittsburgh Coal* that was no longer special in *Nordlinger*? Why was animus against gays an impermissible purpose in *Romer* but only part of a valid attempt to promote morality in *Bowers v. Hardwick*? Certainly, the Court has never attempted to answer these questions and it is doubtful that any reasoned set of distinctions would explain the different results. Therefore, the Court's selection of these ten cases for heightened rationality review cannot be explained by reference to the nature of the class disadvantaged.

The second attempt to explain these ten cases would be by reference to the nature of the government interest involved. In terms of the government interest at issue, these ten cases involved taxes,⁴⁹⁴ food stamps,⁴⁹⁵ education,⁴⁹⁶ monetary benefits from the government,⁴⁹⁷ housing,⁴⁹⁸ eligibility for public office,⁴⁹⁹ and access to the political process.⁵⁰⁰ Once again, in search of a pattern that could explain heightened scrutiny, one could identify some similarities between the government benefits denied in these cases and fundamental rights that the Court has explicitly recognized. This would help explain why the Court used

492. *Cleburne*, 473 U.S. at 446.

493. *E.g.*, *Quinn*, 491 U.S. at 107 n.10; *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985); *Zobel v. Williams*, 457 U.S. 55, 60-61 (1982).

494. *See Allegheny Pittsburgh Coal*, 488 U.S. at 336; *Williams v. Vermont*, 472 U.S. 14 (1985); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *Hooper*, 472 U.S. at 612.

495. *See United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).

496. *See Plyler v. Doe*, 457 U.S. 202 (1982).

497. *See Zobel*, 457 U.S. at 55.

498. *See City of Cleburne v. Cleburne Living Ctr.*, 437 U.S. 432 (1985).

499. *See Quinn v. Millsap*, 491 U.S. 95 (1989).

500. *See Romer v. Evans*, 517 U.S. 620 (1996).

heightened rationality to review cases that limited access to the political process or eligibility for public office since these two claims are closely related to the existing fundamental right to vote.⁵⁰¹ Further, at least an argument could be made, notwithstanding the Court's protestations to the contrary, that there is some fundamental claim to a minimum level of food, housing, and education that would require denials of those benefits to be more highly scrutinized.

Once again, though, the attempt to identify a consistent principle by reference to the nature of the government interest fails. First, what about the five other cases that concerned the state's taxing power and the state's decision on how to allocate limited state monetary resources? These are two areas which lack precedent for identifying the interest as quasi-fundamental. As to the other five cases, where there is a stronger argument about the interests being quasi-fundamental, there is the same problem of consistency. Why were food stamps quasi-fundamental in *Moreno* but not so in *Knebel*, *Castillo*, and *International Union*? Why was housing quasi-fundamental in *Cleburne* but not so in *Lindsey v. Normet*?⁵⁰² Why was education quasi-fundamental in *Plyler* but not in *Rodriguez*, *Martinez*, or *Kadrmas*? Why would eligibility for public office be quasi-fundamental in *Millsap*, but not so in *Clements v. Fashing*?⁵⁰³ And finally, why would some equal access to the political process be fundamental in *Romer*, but not so in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*?⁵⁰⁴ Ultimately, the attempt to identify a consistent principle by reference to the nature of the government interest affected is unsuccessful.

A third possible explanation for the results in these ten cases would be the law-as-politics school of thought. In this view, the results of legal decisions are best explained by the political leanings of the judges who decided them. If this is so, then one would expect to see that the active, heightened rational basis decisions were written by judges who would be characterized as liberal, that is, judges willing to invalidate the results of democratic government on the grounds that such legislation violates a command that they perceive in the Constitution. Of course, the utility of categorizing Justices as liberal or conservative has always been in question,⁵⁰⁵ and the attempt to do so here sheds no additional light

501. See *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.").

502. 405 U.S. 56 (1972).

503. 457 U.S. 957 (1982) (plurality opinion) (upholding, under rational basis standard, provisions of the Texas Constitution that restricted access of current public officials to other elective office).

504. 410 U.S. 719 (1973).

505. See, e.g., Rex E. Lee & Richard G. Wilkins, *On Greatness and Constitutional Vision: Justice Byron R. White*, 1994 BYU L. REV. 291, 299 n.45 (1994) (quoting FRANK M. COFFIN, *THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH* 201 (1980)) ("All that I think can be justly said about the utility of applying overworked labels to judges is that they are

on the reasons for these ten cases.

If the heightened rationality cases are an example of liberal judging, then one would expect to see a substantial percentage of the opinions written by Justices Brennan or Marshall, the two widely acknowledged liberals on the Court.⁵⁰⁶ Two of the opinions⁵⁰⁷ were in fact written by Justice Brennan, but that is all. The other eight opinions were written by Justices who either are uniformly identified as conservative or who at least have a substantial record of conservatism in their judicial opinions. It turns out that Chief Justices Burger and Rehnquist, no champions of the liberal paradigm, wrote three of the ten opinions.⁵⁰⁸ Justice White, appointed by a Democrat, but usually considered to be a Justice aligned with the conservative side of the Court,⁵⁰⁹ wrote two of the opinions.⁵¹⁰ Justices Powell, Blackmun, and Kennedy, all nominated by Republican presidents, each wrote one of the ten opinions.⁵¹¹ It is also interesting to note that the opinions in the two heightened rationality cases that the Court decided in 1989⁵¹² were written for a unanimous Court. All of this suggests that the successful rational basis claims are not well explained by the politics of judicial appointment and judicial decision-making.

Finally, what about explaining the cases by reference to a harmonizing principle obtainable from within the internal logic of the cases themselves? Gerald Gunther suggested that the Court would look less to government ends and look more at the means the state had chosen to accomplish those ends.⁵¹³ Once again, this organizing principle does not hold up to scrutiny. In four of the cases,⁵¹⁴ the Court did in fact use means analysis only, that is, the Court assumed

appropriate to some judges on some issues some of the time.”).

506. E.g., Earl M. Maltz, *The Prospects For a Rival of Conservative Activism in Constitutional Jurisprudence*, 24 GA. L. REV. 629, 666 (1990) (describing Justices Brennan and Marshall as “the two most liberal members of the Court”).

507. *United States Dep’t of Agric. v. Moreno*, 413 U.S. 528, 529 (1973); *Plyler v. Doe*, 457 U.S. 202, 205 (1982).

508. *Zobel v. Williams*, 457 U.S. 55, 56 (1982) (Burger, C.J.); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 614 (1985) (Burger, C.J.); *Allegheny Pittsburgh Coal Co. v. County Comm’n*, 488 U.S. 336, 338 (1989) (Rehnquist, C.J.). It should be noted that Chief Justice Rehnquist dissented in *Zobel* and *Hooper*.

509. See, e.g., Lee & Wilkins, *supra* note 505, at 299 n.45 (quoting description by David O. Stewart, *White to the Right*, A.B.A. J., July 1990, at 40, of Justice White as “[o]rordinarily conservative”).

510. *Williams v. Vermont*, 472 U.S. 14, 15 (1985); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 435 (1985).

511. *Romer v. Evans*, 517 U.S. 620, 621 (1996) (Kennedy, J.); *Quinn v. Millsap*, 491 U.S. 95, 96 (1989) (Blackmun, J.); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 871 (1985) (Powell, J.).

512. *Allegheny Pittsburgh Coal*, 488 U.S. at 337; *Quinn*, 491 U.S. at 95.

513. See *supra* notes 115-20 and accompanying text.

514. *Quinn*, 41 U.S. at 95; *Allegheny Pittsburgh Coal*, 488 U.S. at 336; *Williams*, 472 U.S. at 14; *Plyler v. Doe*, 457 U.S. 202 (1982).

that the governmental purpose was valid but found an inadequate connection between the classification and that purpose. But in four other cases,⁵¹⁵ the Court used a *means* and *ends* analysis, finding both that some of the statutory purposes were impermissible and also that the classification was not sufficiently related to a permissible purpose. Finally, in two cases,⁵¹⁶ the Court used an ends analysis only, finding that the statute at issue was designed to achieve impermissible purposes.

This search for an underlying principle that would explain the results in the heightened rationality cases appears to be unsuccessful. Rather, it appears that the Court, without explanation, decided in a particular case to use heightened rationality and thus the claim succeeded. The Court then proceeded to ignore that case in the future. Federal judges and future litigants, who use Supreme Court precedents to predict future results, engage in a very difficult task. Is it too much to ask that the Court decide cases consistently and predictably? Apparently the answer to this question is yes. Of course, equal protection analysis, like other constitutional analysis, has a political component. But, even with this political dimension, the Court still writes opinions that purport to explain its decisions as the result of a careful analysis of legal precedents, not as a display of raw political power. If reasoned analysis were not the point of judicial opinions, all the Court would have to do in deciding a case would be to count the votes, without explaining the result. The Court continues to write opinions as if they matter, but the Court's jurisprudence of heightened rationality is difficult to understand.

515. *Cleburne*, 473 U.S. at 432; *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).

516. *Romer*, 517 U.S. at 620; *Metropolitan Life*, 470 U.S. at 869.

APPENDIX

Equal Protection Rational Basis Cases Decided 1973-May 1996

This Appendix is intended to be a reasonably complete listing of all equal protection rational basis cases decided by the U.S. Supreme Court from 1973 until May, 1996. Its purpose is twofold. The first is to quantify the evidence, that is, show the relatively small number of cases that have been decided for plaintiffs during that period (only ten), while giving some indication of the relatively large number of cases that were decided for defendants in that period (100). The second purpose is to provide a convenient listing of rational basis cases.

Although the intent here is to make this Appendix comprehensive, a few words of caution are appropriate. The U.S. Supreme Court does not feel bound to issue all of its equal protection opinions with explicit reference to one of the three identified standards of review. Nor does it feel the need to use the word “rational” or “rationality” in deciding a case on the basis of minimal scrutiny. What this means is that it is sometimes unclear whether a particular case is, in fact, an example of rationality review. Thus, for example, in cases that involve voting or access to the criminal process, the Court sometimes makes no mention of strict scrutiny or rationality, but does cite as support earlier cases that did speak of fundamental rights or heightened scrutiny. Although it is not clear what standard of review the Court is using in such cases, the level of scrutiny is probably something higher than traditional rationality, so those cases are not included here.

Another issue of inclusion on this list is the gender and illegitimacy cases that used language of rationality at a period of time before the Court had formally adopted a heightened standard of review for these classifications. Once again, since there is probably something more than traditional rationality going on here, those cases are not included here.

Finally, there are two cases in which the Court clearly used the language of rationality but did not actually decide the issue on the merits. In one of these cases, *Hagans v. Lavine*, 415 U.S. 528 (1974), the equal protection issue was raised as part of a jurisdictional claim, and in the other, *Papasan v. Allain*, 478 U.S. 265 (1986), the Court’s equal protection discussion was in the nature of advice to the court of appeals on remand of an issue that the Court said it would not decide. Those two cases are not included here.

What follows, then, is a reasonably thorough listing of rational basis cases from 1973 through May 1996.

Plaintiff Cases

Romer v. Evans, 517 U.S. 620 (1996).

Quinn v. Millsap, 491 U.S. 95 (1989).

Allegheny Pittsburgh Coal Co. v. County Comm’n, 488 U.S. 336 (1989).

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985).

Williams v. Vermont, 472 U.S. 14 (1985).
Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985).
Plyler v. Doe, 457 U.S. 202 (1982).
Zobel v. Williams, 457 U.S. 55 (1982).
United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

Defendant Cases

Heller v. Doe, 509 U.S. 312 (1993).
FCC v. Beach Communications, Inc., 508 U.S. 307 (1993).
Reno v. Flores, 507 U.S. 292 (1993).
Nordlinger v. Hahn, 505 U.S. 1 (1992).
Burlington N. R.R. Co. v. Ford, 504 U.S. 648 (1992).
Gregory v. Ashcroft, 501 U.S. 452 (1991).
Chapman v. United States, 500 U.S. 453 (1991).
Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261 (1990).
Sullivan v. Stroop, 496 U.S. 478 (1990).
United States v. Sperry Corp., 493 U.S. 952 (1989).
Michael H. v. Gerald D., 491 U.S. 110 (1989).
City of Dallas v. Stanglin, 490 U.S. 19 (1989).
Amerada Hess Corp. v. Director, Div. of Taxation, 490 U.S. 66 (1989).
Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450 (1988).
New York State Club Ass'n, Inc. v. City of N.Y., 487 U.S. 1 (1988).
Immigration & Naturalization Serv. v. Pangilinan, 486 U.S. 875 (1988).
Bankers Life and Cas. Co. v. Crenshaw, 486 U.S. 71 (1988).
Lyng v. International Union, 485 U.S. 360 (1988).
Pennell v. City of San Jose, 485 U.S. 1 (1988).
Bowen v. Gilliard, 483 U.S. 587 (1987).
Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987).
Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986).
Lyng v. Castillo, 477 U.S. 635 (1986).
Bowen v. Owens, 476 U.S. 340 (1986).
Northeast Bancorp v. Board of Governors of Fed. Reserve Sys., 472 U.S. 159 (1985).
Tony and Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985).
Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841 (1984).
Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271 (1984).
Lehr v. Robertson, 463 U.S. 248 (1983).
Exxon Corp. v. Eagerton, 462 U.S. 176 (1983).
Regan v. Taxation With Representation, 461 U.S. 540 (1983).
Martinez v. Bynum, 461 U.S. 321 (1983).
Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).
Rice v. Norman Williams Co., 458 U.S. 654 (1982).
Clements v. Fashing, 457 U.S. 957 (1982).

- Schweiker v. Hogan, 457 U.S. 569 (1982).
Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982).
G. D. Searle & Co. v. Cohn, 455 U.S. 404 (1982).
Texaco, Inc. v. Short, 454 U.S. 516 (1982).
Hodel v. Indiana, 452 U.S. 314 (1981).
Jones v. Helms, 452 U.S. 412 (1981).
Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648 (1981).
Ball v. James, 451 U.S. 355 (1981).
Schweiker v. Wilson, 450 U.S. 221 (1981).
Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).
United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980).
Harris v. McRae, 448 U.S. 297 (1980).
Washington v. Confederated Tribes, 447 U.S. 134 (1980).
Harris v. Rosario, 446 U.S. 651 (1980).
Lewis v. United States, 445 U.S. 55 (1980).
Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).
Califano v. Boles, 443 U.S. 282 (1979).
Barry v. Barchi, 443 U.S. 55 (1979).
Personnel Adm'r v. Feeney, 442 U.S. 256 (1979).
Ambach v. Norwick, 441 U.S. 68 (1979).
New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979).
Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194 (1979).
Vance v. Bradley, 440 U.S. 93 (1979).
Friedman v. Rogers, 440 U.S. 1 (1979).
Washington v. Confederated Bands and Tribes of Yakima Indian Nation, 439 U.S. 463 (1979).
Califano v. Aznavorian, 439 U.S. 170 (1978).
Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978).
Duke Power Co. v. Carolina Env'tl Study Group, Inc., 438 U.S. 59 (1978).
Baldwin v. Fish and Game Comm'n, 436 U.S. 371 (1978).
Foley v. Connelie, 435 U.S. 291 (1978).
Cleland v. National College of Bus., 435 U.S. 213 (1978).
Idaho Dep't of Employment v. Smith, 434 U.S. 100 (1977).
Califano v. Jobst, 434 U.S. 47 (1977).
County Bd. v. Richards, 434 U.S. 5 (1977).
Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977).
Maher v. Roe, 432 U.S. 464 (1977).
Poelker v. Doe, 432 U.S. 519 (1977).
Dobbert v. Florida, 432 U.S. 282 (1977).
Ohio Bureau of Employment Servs. v. Hodory, 431 U.S. 471 (1977).
Alexander v. Fioto, 430 U.S. 634 (1977).
Swain v. Pressley, 430 U.S. 372 (1977).
Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73 (1977).
Knebel v. Hein, 429 U.S. 288 (1977).
Mathews v. de Castro, 429 U.S. 181 (1976).
City of New Orleans v. Dukes, 427 U.S. 297 (1976).

Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).
Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976).
Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).
City of Charlotte v. Local 660, Intern. Ass'n of Firefighters, 426 U.S. 283 (1976).
Mathews v. Diaz, 426 U.S. 67 (1976).
Weinberger v. Salfi, 422 U.S. 749 (1975).
Estelle v. Dorrough, 420 U.S. 534 (1975).
Geduldig v. Aiello, 417 U.S. 484 (1974).
Fuller v. Oregon, 417 U.S. 40 (1974).
Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).
Johnson v. Robison, 415 U.S. 361 (1974).
Marshall v. United States, 414 U.S. 417 (1974).
Broadrick v. Oklahoma, 413 U.S. 601 (1973).
San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).
Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973).
Associated Enter., Inc. v. Toltec Watershed Improvement Dist., 410 U.S. 743 (1973).
Ortwein v. Schwab, 410 U.S. 656 (1973).
Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973).
McGinnis v. Royster, 410 U.S. 263 (1973).
United States v. Kras, 409 U.S. 434 (1973).

DOMINATION OF A SUBSIDIARY BY A PARENT

WILLIAM J. RANDS*

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INTRODUCTION

This Article examines piercing the corporate veil of a subsidiary to make its parent corporation liable for the subsidiary's obligations. More particularly, it focuses on what many of the cases seem to designate as the key component in the formulas for deciding whether to pierce the corporate veil: The parent corporation's domination of a subsidiary, either with respect to the transaction in question or generally. The number of cases regarding parent liability is

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voluminous,¹ and most of the cases mention domination.² Are these references nebulous prattle or one of the obfuscating “mists of metaphor” long ago decried by Judge Cardozo?³ Many veil-piercing cases are said to be no more than exercises in cataloguing a number of factors present in a situation to reach a normative conclusion that piercing is or is not appropriate.⁴ Such factors are said to be numerous and often unhelpful.⁵ Is domination a make-weight listing on such a laundry list, or an important, mandatory, or even conclusive factor? Should it be accorded any weight at all? Some non-lawyers in the business community likely would be startled to know that a parent could be penalized for paying close attention to its subsidiary’s affairs. Conversely, several current commentators have proposed that parents should no longer be protected by limited liability and should be made liable for the debts of their subsidiaries.⁶

1. In his monumental study, Robert B. Thompson found 637 cases involving corporate groups and piercing the corporate veil. Courts pierced the veil in 237, or 37.21% of those cases. Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1055 (1991).

2. In his study, Thompson states that courts found “domination and control” in 551 cases and pierced the corporate veil in 314 of them, or 56.99%. *Id.* at 1063. Not all of the cases finding “domination and control” involved corporate groups. *Id.*

3. Perhaps the most well known of all aphorisms regarding American corporate law is the following observation made by Judge Cardozo in 1926: “The whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of metaphor. Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.” *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926). Some of the many metaphors used in the caselaw include: “mere adjunct, agent, alter ego, alter idem, arm, blind, branch, buffer, cloak, coat, corporate double, cover, creature, curious reminiscence, delusion, department, dry shell, dummy, fiction, form, formality, instrumentality, mouthpiece, name, nominal identity, phrase, puppet, screen, sham, simulacrum, snare, subterfuge, tool.” ELVIN R. LATTY & GEORGE T. FRAMPTON, *BASIC BUSINESS ASSOCIATIONS: CASES, TEXT AND PROBLEMS* 721 (1963).

4. See *National Bond Fin. Co. v. General Motors Corp.*, 238 F. Supp. 248, 256 (W.D. Mo. 1964), *aff’d*, 341 F.2d 1022 (8th Cir. 1965); Douglas J. Gardner, Comment, *An Innovative Approach to Piercing the Corporate Veil: An Introduction to the Individual Factor and Cumulative Effects Analysis*, 25 LAND & WATER L. REV. 563, 564 (1990).

5. See Robert B. Thompson, *The Limits of Liability in the New Limited Liability Entities*, 32 WAKE FOREST L. REV. 1, 9 (1997).

6. The most persistent of such commentators has been Phillip I. Blumberg. See PHILLIP I. BLUMBERG, *THE LAW OF CORPORATE GROUPS: SUBSTANTIVE LAW* § 5.01 (1987) [hereinafter *LAW OF CORPORATE GROUPS*]; Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 365-66 (1990); Phillip I. Blumberg & Kurt A. Strasser, *Corporate Groups and Enterprise Liability: Contracts and Torts*, 706 PRACTICING L. INST./CORP. 7 (1990). See also, e.g., WILLIAM L. CARY & MELVIN ARON EISENBERG, *CORPORATIONS: CASES AND MATERIALS* 187 (7th ed. unabridged 1995); MELVIN ARON EISENBERG, *THE LAW RELATING TO CORPORATE GROUPS* 10-12 (M. Gillooly ed. 1993); Joseph H. Sommer, *The Subsidiary: Doctrine Without Cause?*, 59 FORDHAM L. REV. 227, 230 (1990). Cf. Jonathan M. Landers, *A Unified Approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy*, 42 U. CHI. L. REV. 589,

I. LIMITED LIABILITY, GENERALLY

In the United States, the corporation is a distinct legal entity, separate and apart from its shareholders. Perhaps as a consequence of its status as a legal entity and as a result of a conscious policy decision to promote capital formation,⁷ a corporation incurs its own liabilities and is legally responsible for payment of its obligations, whether created by contracts, torts, or statute. As a result of the corporation being responsible for its debts, the shareholders are not automatically liable for their corporation's obligations. Shareholders can become liable only on the basis of their own conduct, not merely from their status as shareholders. Hence, they are not ordinarily vicariously liable for their entity's obligations. This protection from liability for shareholders is, of course, called limited liability. Unless the shareholders engage in some type of offensive conduct, the risk of loss is limited to what they have put in (and left in) their corporation.

Limited liability has been a prevailing rule in the United States for more than a century.⁸ It is "fundamental to the law of every jurisdiction in the United States."⁹ The United States Supreme Court concluded that "limited liability is the rule not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted."¹⁰ Limited liability as a policy has been lavished with praise approaching hyperbole. The President of Columbia University once called it "the greatest single discovery of modern times Even steam and electricity are far less important."¹¹

619 (1975).

7. According to Blumberg, the reality appears to have been that limited liability resulted from conscious policy decisions to stimulate economic activity "by encouraging wide-spread investment in corporate shares." Philip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 575-576, 604 (1986). See also Stephen B. Presser, *Thwarting the Killing of the Corporation: Limited Liability, Democracy and Economics*, 87 NW. U. L. REV. 148, 155 (1992).

8. See Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1879 (1991).

9. Cathy S. Krendl & James R. Krendl, *Piercing the Corporate Veil: Focusing the Inquiry*, 55 DENV. L.J. 1, 2 (1978).

10. *Anderson v. Abbott*, 321 U.S. 349, 362 (1944).

11. 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 21 (perm. ed. rev. vol. 1990), quoted in Roger E. Meiners et al., *Piercing the Veil of Limited Liability*, 4 DEL. J. CORP. L. 351, 351 (1979). Meiners et al. quote, perhaps with some wryness, other praises to limited liability stating, for example, "This attribute of limited liability . . . is regarded by most persons as the greatest advantage of incorporation. Indeed, many immigrants doubtless possess full knowledge of this fact before coming within hailing distance of the Statue of Liberty." Meiners et al., *supra*, at 351-52 (quoting I. WORMSER, DISREGARD OF THE CORPORATE FICTION AND ALLIED CORPORATE PROBLEMS 14 (1929)).

A. Debate Over Limited Liability as a Policy

Limited liability as a policy matter has been the focus of much recent debate among academicians. Two prominent scholars, Frank H. Easterbrook and Daniel R. Fischel, offer an economic theory in support of limited liability.¹² For example, they posit that rational investors made fully liable for the debts of the enterprises in which they invest would not choose to invest in more than a few entities.¹³ They conclude that "[t]he increased availability of funds for projects with positive net values is the real benefit of limited liability."¹⁴ Limited liability facilitates an effective allocation of risk of loss amongst the investors in the enterprise.¹⁵ Two equally prominent scholars, Henry Hansmann and Reinier Kraakman, contest the Easterbrook and Fischel assertion that the role of limited liability is economically efficient and propose to replace limited liability for shareholders with pro rata liability compensating tort creditors.¹⁶ More

12. Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89 (1985).

13. *Id.* at 90. See also LAW OF CORPORATE GROUPS, *supra* note 6, § 4.02.8; Theresa A. Galbadon, *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders*, 45 VAND. L. REV. 1387, 1405 (1992); Henry G. Manne, *Our Two Corporation Systems: Law and Economics*, 53 VA. L. REV. 259, 262 (1967). In addition to the diversification of portfolios, the law and economic theorists offer other benefits for a rule of limited liability. First, limited liability decreases the need of investors to monitor the actions of the managers, decreasing the cost of trading. Second, a rule of unlimited liability would create a need for an investor to monitor fellow shareholders, increasing the costs of trading. Third, limited liability creates an incentive for management to act efficiently. If they do not, the stock price will fall, the stock will become a bargain, the corporation will be taken over, and they will be displaced as managers. Fourth, without limited liability, wealthy investors, who have more to lose than poor investors, would assign a lower value to a particular security because the greater risk of liability would reduce the stock's value to the wealthy investor. In contrast, limited liability makes the shares of a single corporation fungible with one another and therefore facilitates trading. Fifth, limited liability encourages the managers to take business risks that they otherwise would not take. Sixth, unlimited liability would increase the cost of creditors who would be required to file expensive collection suits against shareholders scattered around the world. Seventh, limited liability in effect creates a contract term between the corporation, creditors, and investor. Thus, it eliminates the necessity for investors to incur the expense of contracting out of personal liability. See LAW OF CORPORATE GROUPS, *supra* note 6, § 4.02; LOUIS D. SOLOMON & ALAN R. PALMITER, CORPORATIONS: EXAMPLES AND EXPLANATIONS § 6.1 (1990); Robert Charles Clark, *The Regulation of Financial Holding Companies*, 92 HARV. L. REV. 787, 825 (1979); Easterbrook & Fischel, *supra* note 12, at 94-97; Richard A. Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. CHI. L. REV. 499, 506, 515 (1976).

14. See Easterbrook & Fischel, *supra* note 12, at 97.

15. See FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 44-47 (3rd prtg. 1996).

16. Hansmann & Kraakman, *supra* note 8, at 1896. Hansmann and Kraakman assert that pro rata liability would eliminate the monitoring problems cited by Easterbrook and Fischel, and

importantly, they decry that limited liability leaves tort creditors uncompensated, while shareholders externalize the costs of doing business and reap great profits at society's expense.¹⁷ Another scholar, Teresa A. Galbadon, concludes that an organization conceived by feminists would not feature limited liability, because feminist theory condemns attempts to personally profit while consciously risking injury to third parties.¹⁸

B. Policy of Limited Liability for Corporate Groups

There has been substantial opposition to limited liability for the constituent members of affiliated groups of corporations. Phillip I. Blumberg has led the charge against limited liability. He argues for "enterprise liability."¹⁹ According to this view, all members of an affiliated group (the "enterprise") should be treated as one legal entity with this enlarged entity liable for the debts of any member of the group.²⁰ Blumberg argues that even if the Easterbrook and Fischel-type of justifications for limited liability—its contribution to the efficient working of the marketplace—is generally valid, these economic justifications are largely irrelevant with respect to the debts of members of an affiliated group of corporations.²¹ For example, in most corporate groups, a parent corporation is the sole shareholder and is engaged to some degree in the management of the subsidiary. Thus, there would be no need to worry about the excessive monitoring costs that would exist if unlimited liability were the rule for the shareholders in free-standing corporations (i.e., shareholders of the parent corporation itself or of corporations that are not members of an affiliated group).²² Blumberg acknowledges that limited liability encourages risk-taking by management, and this might be important in the case of a conglomerate that is considering an investment in areas unrelated to the existing businesses of the group.²³ He counterargues, however, that limited liability should not be permitted in a case of an integrated group where the additional investment represents a horizontal or vertical extension of activities already being

because catastrophic tort liability is rare, most investors would not be deterred or would be able to diversify. *Id.* at 1907-09. See also CARY & EISENBERG, *supra* note 6, at 185-89; Presser, *supra* note 7, at 171.

17. Hansmann & Kraakman, *supra* note 8, at 1882-83; Presser, *supra* note 7, at 170. See also CARY & EISENBERG, *supra* note 6, at 186; Galbadon, *supra* note 13, at 1429-31. Referring to a possible elimination of limited liability and the taxicab company cases, Michael P. Dooley said, "[t]he tradeoff is that shareholder liability will result in fewer cabs and higher fares, but there is no obvious reason why accident victims should subsidize cab drivers." MICHAEL P. DOOLEY, FUNDAMENTALS OF CORPORATION LAW 53-54 (1995).

18. Galbadon, *supra* note 13, at 1430-31.

19. LAW OF CORPORATE GROUPS, *supra* note 6, §§ 6.01-.10, 13.01-.06.

20. *Id.*

21. *Id.* §§ 5.01-.02.

22. See *id.* § 5.01.

23. *Id.*

undertaken.²⁴

Jonathan M. Landers discusses the liability of the constituent members of an affiliated group of corporations in the context of bankruptcy.²⁵ In this context, the dominant motivation of both the managers and the owners of the group likely will be to maximize the return for the enterprise as a whole.²⁶ The profitability of any particular member tends to be irrelevant, except as it contributes to the overall effort of the complete enterprise.²⁷ The managers and owners are, therefore, likely to depart the methods of management usually followed in the case of a single, unrelated, free-standing corporate unit.²⁸ For example, while the undisciplined movement of assets from an independent, free-standing corporation to its shareholders is likely to hinder that corporation's successful operation of its businesses, the movement of assets from one member of an affiliated group to another member in that group might actually help to maximize the overall productive use of the capital and resources of the enterprise of the full group.²⁹ Despite this reality, judges often require that, as a prerequisite for a parent's limited liability, a subsidiary should have a will separate and apart from its parent (as if it has some sort of incorporeal existence apart from the parent).³⁰ Moreover, the locus of decision-making power usually resides in the managers of the parent of the group and it makes decisions determined by the needs of the group as a whole. It is naive to believe that the parent's managers will remain silent if they disagree with the policies set by the subsidiary's managers (even if the subsidiary has its own set of managers).³¹ Hence, the basic test in veil-piercing cases—that the parent's limited liability should be based on treating its subsidiaries as independent profit-making enterprises—does not comport with reality and is doomed to fail as an effective test. Moreover, if limited liability were eliminated for members of an affiliated group, especially for the parent corporation, the effect would be not to subject individual stockholders in the parent to risks greater than their individual investment, a result that might deter investments in the public markets.³² Instead, only the entity responsible for the management of the subsidiary, i.e., the parent, would be held liable, and the larger group of shareholders, those in the parent, would not be held directly responsible for behavior over which they have merely theoretical control.³³

24. *Id.*

25. Landers, *supra* note 6, at 589.

26. *See id.* at 591.

27. *See id.*

28. *See id.*

29. *See id.* at 592.

30. *See id.*

31. *See id.*

32. *See id.* at 596.

33. *See id.* at 623-24. Landers states that creditors of a constituent corporation actually would be exposed to greater risks than creditors of a single corporation. For example, the availability of funds from the other affiliates reduces the practical importance of adequate initial capitalization for any particular member of the group. The danger of commingling assets and

Not all commentators concede to Blumberg and Landers on their main premise. In one widely cited article, William P. Hackney and Tracey G. Benson seek to justify limited liability among affiliated groups:

If a parent corporation is held liable for the obligations of its subsidiary, the shareholders of the parent are hurt, through the lowering of the value of their investment in the parent in the same way as if they themselves had been held liable and had been forced to sell a portion of their investment in a parent in order to pay the liability.³⁴

Stephen B. Presser agrees that the original reason for allowing limited liability for shareholders is to encourage investment and that "subdividing risks," by allowing parents to reduce risks by incorporating subsidiaries, still serves the investment-encouraging rationale.³⁵ The parent's shareholders are those who profit by reducing the risks of liability to the parent. The more their risks are reduced, the greater their potential profit, and the more they are encouraged to invest in the parent's stock.³⁶

C. Limited Liability in Closely Held Corporations

The focus of the Easterbrook and Fischel defense of limited liability is the publicly held corporation with widely dispersed and unrelated shareholders and a separation between the shareholders and managers. They justify limited liability by asserting that unlimited liability would impair the market's capacity to diversify risks and value shares. This justification does not apply to closely held corporations.³⁷ Thus, some commentators argue, limited liability should not be granted to the shareholders of closely held corporations, at least for torts. The normal predicate for making a principal vicariously liable for a tort committed by an agent is that the principal controlled the agent's activities. That normal predicate is missing in the case of publicly held corporations but not in closely

properties is greater between the affiliated corporations than between shareholders and independent, free-standing corporations. In affiliated groups of corporations, there is a greater chance that each member's economic viability is tied to that of other members of the group, so that each particular member may be unable to develop the independent profit-making activities expected of free-standing corporate entities. The managers of the parent are most interested in the overall return of the full enterprise. *See id.* at 596-97.

34. William P. Hackney & Tracey G. Benson, *Shareholder Liability for Inadequate Capital*, 43 U. PITT. L. REV. 837, 872-73 (1982). *See also* Johnson v. Flowers Indus., Inc., 814 F.2d 978, 980 (4th Cir. 1987).

35. Presser, *supra* note 7, at 173.

36. *See id.* at 175.

37. Easterbrook and Fischel note the reasons they offer to justify limited liability in publicly traded corporations are ill-fitting to closely held corporations. Easterbrook & Fischel, *supra* note 12, at 109-10. *See also* CARY & EISENBERG, *supra* note 6, at 186-87; Hansmann & Kraakman, *supra* note 8, at 1903 n.67.

held corporations where control and ownership are usually intertwined.³⁸

Hansmann and Kraakman concede that a rule of unlimited liability would result in some businesses not being started, because putative owners would be unwilling to expose personal assets to the risks of a tort judgment.³⁹ But Hansmann and Kraakman like this result.⁴⁰ They think that such small firms should not exist and that one advantage of unlimited liability is that it would force such small ventures, which effectively are subsidized by tort victims, out of business.⁴¹ Agreeing with Hansmann and Kraakman, Professor Melvin Eisenberg states:

[U]nder a rule of shareholder liability for tort claims, wealthy shareholders would avoid investments in corporations that did not make adequate provision for tort claims through insurance. This would be a powerful incentive to corporations to adequately insure. That, in turn, would not only be a socially desirable result, but would further minimize a likelihood that liability would actually be imposed on shareholders.⁴²

Limited liability for closely held corporations has its scholarly supporters. Larry E. Ribstein contends that limited liability is an efficient bargain in closely held as well as in publicly held corporations.⁴³ It serves the important functions in closely held firms of facilitating diversification of risks, separation of ownership and control, and reducing creditors' need to monitor shareholder wealth. Ribstein also notes that there is little reason for believing that limited liability in closely held corporations actually externalizes costs.⁴⁴ Indeed, it might be asked whether there is a significant proportion of legitimate tort claims that have not been satisfied from insurance or corporate assets.⁴⁵ David W. Leebron likewise supports limited liability for closely held corporations.⁴⁶ For many investors in closely held corporations, their closely held corporation stock represents only a part of their portfolio. For example, the investor may have a house, cash, other real estate, and perhaps a portfolio of other securities. If all of their other assets were exposed, they might choose not to invest in the closely

38. See CARY & EISENBERG, *supra* note 6, at 186-87. Cf. Robert B. Thompson, *Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise*, 47 VAND. L. REV. 1, 36 (1994) (emphasizing parent's control of a subsidiary as a reason to pierce the veil of a subsidiary in order to attach liability to a parent).

39. Hansmann & Kraakman, *supra* note 8, at 1888.

40. *Id.*

41. *Id.*

42. CARY & EISENBERG, *supra* note 6, at 187-88.

43. Larry E. Ribstein, *Limited Liability and Theories of the Corporation*, 50 MD. L. REV. 80, 106 (1991).

44. *Id.*

45. See DOOLEY, *supra* note 17, at 54.

46. David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565, 1629-30 (1991).

held corporation stock at all.⁴⁷ Leebron also contrasts the risk-bearing capacity of shareholders of publicly held corporations with shareholders of closely held corporations.⁴⁸ In the case of publicly held corporations, the large number of shareholders allows the loss and, therefore, the risk, to be spread among many investors.⁴⁹ Unlimited tort liability for closely held shareholders, however, would concentrate these losses on a small number of shareholders. Placing unlimited liability on the closely held corporation shareholder would likely result in underinvestment.⁵⁰ Presser has taken an historical approach to supply a defense to limited liability for the closely held corporation.⁵¹ Without limited liability, it was believed that only the very wealthiest persons, such as New York's industrial titan John Jacob Astor, would have been able to invest in corporations.⁵² As such, limited liability "reflects a venerable desire to help out smaller investors . . . reflects democracy as much as economics . . . [and] ought to be most sacred for smaller firms."⁵³

D. Author's View on Policy of Limited Liability

Though the literature is laden with brilliant debate and analysis, the discussions of the economic impact of liability are generally theoretical and without empirical research support.⁵⁴ Considering the lack of supporting data, one senses that each scholar is making a normative judgement based on his or her political leanings and intuition. My view supports limited liability for publicly held corporations, closely held corporations and affiliated groups, at least as the general rule. By allowing investors to externalize some costs and thereby lower the cost for corporate stock, economic development likely will take place with synergistic effects that generate widespread benefits.⁵⁵ Furthermore, some investors might be inhibited from investing in stock, if they were to be made vicariously liable for all the debts of the corporation. As a result of limited liability, society probably benefits from an increased amount of economic activity.⁵⁶ Regardless, limited liability is not an absolute rule. Judges can temper its harshness in some cases by piercing the corporate veil.⁵⁷ Moreover, some of

47. *See id.*

48. *Id.* at 1630.

49. *See id.*

50. *See id.*

51. Presser, *supra* note 7, at 156.

52. *See id.*

53. *Id.* at 163.

54. *See* LAW OF CORPORATE GROUPS, *supra* note 6, § 4.01. As Professor Eisenberg states, the real-world weight of the stock-market-efficiency argument is difficult to judge, even for publicly held corporations. CARY & EISENBERG, *supra* note 6, at 187.

55. *See* Presser, *supra* note 7, at 172.

56. *See* Thompson, *supra* note 1, at 1039-40.

57. Eisenberg states that piercing the corporate veil can act as a "safety valve that takes some of the pressure off the limited liability rule in the cases where the rule is most dubious." CARY &

the victims of insolvent corporations have the protective safety net of social legislation such as unemployment compensation.⁵⁸

E. State Legislatures Ignore Debate and Expand Limited Liability

As stimulating as the academic debate has been, state legislatures have paid no attention to it. Not wanting to be left behind, virtually every state has enacted legislation that authorizes the creation of limited liability companies and limited liability partnerships, two types of entities that provide limited liability for their owners.⁵⁹ Perhaps the legislators ought to be concerned, like Hansmann and Kraakman, with the externalization of the tort costs created by firms within their borders. In truth, however, their ears are more attuned to the entreaties of their respective business communities. What the business community wants, the business community usually gets. Moreover, the notorious “race to the bottom” likely would doom the efforts of a Don Quixote in a state legislature who tried to transpose the Hansmann and Kraakman argument into legislation. The Hansmann and Kraakman rule would result in corporate flight across state lines—into states where the law provided the greatest degree of limited liability.⁶⁰

II. TRADITIONAL VERBAL FORMULATIONS

The jurisprudence of piercing the corporate veil is almost uniformly deemed garbled. For example, Robert Charles Clark, of Harvard University Law School, has written:

Despite the fact that different courts' lists of relevant factors bear a family resemblance to one another, a lawyer surveying a broad range of cases involving attempts to pierce the corporate veil might easily conclude that they are unified more by the remedies sought—subjecting to corporate liabilities the personal assets directly held by shareholders—than by repeated and consistent application of the same criteria for granting the remedy.⁶¹

Yet, surprisingly, the courts almost always merely use several verbiages to confront the hoary issue. One is traceable to Frederick J. Powell's *Parent and Subsidiary Corporations*⁶² and another to California jurisprudence on the “alter

EISENBERG, *supra* note 6, at 191.

58. See Manne, *supra* note 13, at 263.

59. See William J. Rands, *Passthrough Entities and Their Unprincipled Differences Under Federal Tax Law*, 49 SMU L. REV. 15, 29 (1995). Professor Ribstein expounds that limited liability should not be predicated upon incorporation. If limited liability is a good policy, it should be extended to the owners of unincorporated enterprises. See Ribstein, *supra* note 43, at 112.

60. See CARY & EISENBERG, *supra* note 6, at 190.

61. ROBERT CHARLES CLARK, CORPORATE LAW § 2.4, at 73 (1986).

62. FREDERICK J. POWELL, PARENT AND SUBSIDIARY CORPORATIONS (1931). For a discussion of Powell's work, see Krendl & Krendl, *supra* note 9, at 22.

ego.”⁶³

In an effort to formulate clear veil-piercing rules, Powell formulated three tests for piercing the corporate veil in the context of parent and subsidiary corporations.⁶⁴ The first test, the “mere instrumentality” test, requires that the subsidiary corporation be under the complete control and domination of the parent corporation.⁶⁵ The second test, the “fraud or wrong” or “injustice” test, requires that the parent’s control over the subsidiary be used to commit a fraudulent, wrongful or unjust act against the plaintiff.⁶⁶ The third test, the “unjust loss or injury” test, requires that the plaintiff must have been actually harmed as a result of the defendant’s conduct.⁶⁷ All three tests must be met in order to pierce the subsidiary’s corporate veil and impose liability on the parent.⁶⁸ Combining all three elements, Powell stated his formula of parent’s corporate liability as:

When the privilege of transacting business in corporate form has been illegally abused to the injury of a third party, he may disregard the corporate entity to the extent of holding the stockholders liable for the corporate obligations to him. In this way a civil remedy is provided for an unjust wrong or injury caused by the legal fiction of corporate entity.⁶⁹

To help judges and attorneys determine when the requisite domination of the subsidiary is present, Powell provided a laundry-list of relevant factors,⁷⁰ not all

63. See, e.g., *Rosen v. Losch, Inc.*, 44 Cal. Rptr. 377 (1965); *Riddle v. Leuschner*, 335 P.2d 107, 111 (Cal. 1959); *Minifie v. Rowley*, 202 P. 673, 676 (Cal. 1921).

64. POWELL, *supra* note 62, at 4-6.

65. See *id.*

66. See *id.*

67. See *id.*

68. See STEPHEN B. PRESSER, *PIERCING THE CORPORATE VEIL* § 1.03[4] (1997).

69. POWELL, *supra* note 62, at 6.

70. The Powell factors are:

- (a) The parent corporation owns all or most of the capital stock of the subsidiary.
- (b) The parent and subsidiary corporations have common directors or officers.
- (c) The parent corporation finances the subsidiary.
- (d) The parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation.
- (e) The subsidiary has grossly inadequate capital.
- (f) The parent corporation pays the salaries and other expenses or losses of the subsidiary.
- (g) The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation.
- (h) In the papers of the parent corporation or in the statements of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation’s own.

of which must be met. These factors also indicate the fraudulent or unjust character of the parent's control of the subsidiary.⁷¹ Additionally, Powell listed a number of situations that would indicate a wrong or injustice and thus meet the second test. Unlike the alter ego test, only one of the following need to be met: actual fraud, violation of a statute, stripping the subsidiary of its assets, misrepresentation, estoppel, or tort.⁷² Although actual fraud would satisfy the second test, it is not required in order to pierce the corporate veil.⁷³

Powell indicated that his third test, loss or injury to the complainant, may be regarded as part of the second test, fraud or wrong, but the segregation of the two elements "promotes clarity and facilitates the application of the law."⁷⁴ In other words, it may be said that the parent corporation has not used its domination over the subsidiary to defraud or wrong the complainant, unless the complainant has unjustly suffered a loss or injury. Several jurisdictions have not adopted the third test and have relied on the alter ego/mere instrumentality and fraud or wrong tests to pierce the corporate veil.⁷⁵

The leading case to adopt Powell's three-part test for piercing the corporate veil was *Lowendahl v. Baltimore & O.R. Co.*,⁷⁶ which stated the test as follows:

Restating the instrumentality rule, we may say that in any case, except express agency, estoppel, or direct tort, three elements must be proved:

(1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and

(2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and

(3) The aforesaid control and breach of duty must proximately cause

(i) The parent corporation uses the property of the subsidiary as its own.

(j) The directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation in the latter's interest.

(k) The formal legal requirements of the subsidiary are not observed.

Id. at 9.

71. See discussion *infra* Part III.A.

72. See POWELL, *supra* note 62, at 54.

73. See *Anderson v. Abbott*, 321 U.S. 349, 362 (1944).

74. POWELL, *supra* note 62, at 82.

75. See, e.g., *Van Dorn v. Future Chem. & Oil*, 753 F.2d 565 (7th Cir. 1985); *Shapoff v. Scull*, 272 Cal. Rptr. 480 (Cal. Ct. App. 1990).

76. 287 N.Y.S. 62 (N.Y. App. Div. 1), *aff'd*, 6 N.E.2d 56 (1936).

the injury or unjust loss complained of.⁷⁷

Though Powell himself would have called the first prong of his test the “instrumentality” test, his whole analysis has been referred to as the “instrumentality” rule.⁷⁸

If a decision doesn’t use the language traceable to the Powell analysis, it is likely to use the “alter ego” language developed by the California courts. One commonly repeated refrain is that the alter ego doctrine should apply and make a shareholder personally liable when there is “such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and that, if the acts are treated as those of the corporation alone, an inequitable result will follow.”⁷⁹ It is possible to try to draw distinctions between this exceptionally amorphous language and Powell’s “instrumentality” analysis,⁸⁰ but the consensus is that there is little difference between them.⁸¹ The verbal formulations are virtually indistinguishable as to analysis, application, and result. They are often used by courts in the same sentence and should be regarded as interchangeable.⁸²

III. CONTROL AS AN ELEMENT IN PIERCING THE CORPORATE VEIL

A. *The Laundry-Lists*

Veil-piercing cases containing a laundry-list of relevant factors are so numerous that they are virtually innumerable.⁸³ Usually, the cases

77. *Id.* at 76.

78. *See id.*

79. *E.g.*, *Riddle v. Leuschner*, 335 P.2d 107, 110-11 (Cal. 1959). This heavily quoted language can be traced to a landmark California case:

First, that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of the said person and corporation has ceased; second, that the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice.

Minifie v. Rowley, 202 P. 673, 676 (Cal. 1921). *See also* John F. Dobbyn, *A Practical Approach to Consistency in Veil-Piercing Cases*, 19 U. KAN. L. REV. 185, 186 (1971).

80. *See* LAW OF CORPORATE GROUPS, *supra* note 6, §§ 6.02-.03; 1 JAMES D. COX ET AL., CORPORATIONS § 7.16 (1995); Dobbyn, *supra* note 79, at 186-87.

81. *See, e.g.*, LAW OF CORPORATE GROUPS, *supra* note 6, § 6.03; J.S. COVINGTON, JR., BASIC LAW OF CORPORATIONS: CASES, TEXT AND ANALYSES 45 (1989); Phillip I. Blumberg, *The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities*, 28 CONN. L. REV. 295, 331 (1996).

82. *See* LAW OF CORPORATE GROUPS, *supra* note 6, § 6.03 & n.13. Representative cases include *William Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, 933 F.2d 131, 138 (2d Cir. 1991); *House of Koscot Dev. Corp. v. American Line Cosmetics, Inc.*, 468 F.2d 64, 67 n.2 (5th Cir. 1972); *Weisser v. Mursam Shoe Corp.*, 127 F.2d 344, 349 n.11 (2d Cir. 1942).

83. *See, e.g.*, *Lowell Staats Mining Co., Inc. v. Pioneer Uravan, Inc.*, 878 F.2d 1259, 1262-

replicate (without attribution) the Powell factors.⁸⁴ The cases sometimes add or delete factors.⁸⁵ Some decisions say that they are testing for

63 (10th Cir. 1989); *United States v. Jon-T Chems., Inc.*, 768 F.2d 686, 691-92 (5th Cir. 1985); *Nelson v. International Paint Co. Inc.*, 734 F.2d 1084, 1093 (5th Cir. 1984); *Miles v. American Tel. & Tel. Co.*, 703 F.2d 193, 195-96 (5th Cir. 1983); *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 685-87 (4th Cir. 1976); *Steven v. Roscoe Turner Aeronautical Corp.*, 324 F.2d 157, 161 (7th Cir. 1963); *Jacobson v. Buffalo Rock Shooters Supply, Inc.*, 664 N.E.2d 328, 331 (Ill. App. Ct. 1996); *St. Peter v. Ampak-Division of Gatewood Prods., Inc.*, 484 S.E.2d 481, 488-89 (W. Va. 1997); *Panamerica Mineral Servs., Inc. v. KLS Enviro Resources, Inc.*, 916 P.2d 986, 990 (Wyo. 1996).

84. POWELL, *supra* note 62, at 9. See also *Taylor v. Standard Gas & Elec. Co.*, 96 F.2d 693, 704-05 (10th Cir. 1938), *rev'd on other grounds*, 306 U.S. 307 (1939); *Great West Cas. Co. v. Travelers Indem. Co.*, 925 F. Supp. 1455, 1463 (D.S.D. 1996), *aff'd*, 111 F.3d 135 (8th Cir. 1997); *Fidenas AG v. Honeywell Inc.*, 501 F. Supp. 1029, 1035 (S.D.N.Y. 1980); *Duff v. Southern Ry. Co.*, 496 So.2d 760, 763 (Ala. 1986), *Jackson v. General Elec. Co.*, 514 P.2d 1170, 1173 (Alaska 1973).

85. One article lists 31 factors used by courts to justify not piercing the corporate veil. They are:

1. The shareholder is not a party to the contractual or other obligation of the corporation.
2. The subsidiary is not undercapitalized.
3. The subsidiary does not operate at a deficit while the parent is showing a profit.
4. The creditors of the companies are not misled as to which company they are dealing with.
5. Creditors are not misled as to the financial strength of the subsidiary.
6. The employees of the parent and subsidiary are separate and the parent does not hire employees of the subsidiary.
7. The payroll of the subsidiary is paid by the subsidiary and the salary levels are set by the subsidiary.
8. The labor relations of the two companies are handled separately and independently.
9. The parent and subsidiary maintain separate offices and telephone numbers.
10. Separate directors' meetings are conducted.
11. The subsidiary maintains financial books and records which contain entries related only to its own operations.
12. The subsidiary has its own bank account.
13. The earnings of the subsidiary are not reflected on the financial reports of the parent in determining the parent's income.
14. The companies do not file joint tax returns.
15. The subsidiary negotiates its own loans or other financing.
16. The subsidiary does not borrow money from the parent.
17. Loans and other financial transactions between the parent and subsidiary are properly documented and conducted on an arm's-length basis.
18. The parent does not guarantee the loans of the subsidiary or secure any loan with assets of the parent.

domination.⁸⁶ Others say they are testing for alter ego or instrumentality.⁸⁷

Although sometimes decried, laundry-lists of relevant factors can be useful. They are useful in deciding debt-equity controversies under the tax law, and they can be useful for establishing guidelines in the veil-piercing context. Courts pierce the corporate veil when the shareholders fail to abide by a loose set of standards for responsible shareholder conduct, and it is possible to list incidents of bad shareholder conduct that courts do not, or at least should not, tolerate. Asset-stripping comes quickly to mind. The Powell list and its progeny, however, mix the innocuous with the noxious. For example, factor (a) on the list is mere stock ownership, which in no way by itself can be considered bad conduct, while factor (i) is asset-stripping, which obviously is bad conduct.⁸⁸

The innocuous include factor (c), the parent financing the subsidiary, and factor (d), the parent subscribing to the subsidiary's stock or otherwise causes its incorporation.⁸⁹ What is the matter with incorporating and financing a subsidiary? Most subsidiaries would not exist if they were not incorporated and financed by a parent corporation.

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19. The subsidiary's income represents a small percentage of the total income of the parent.
 20. The insurance of the two companies is maintained separately and each pays its own premiums.
 21. The purchasing activities of the two corporations are handled separately.
 22. The two companies avoid advertising as a joint activity or other public relations which indicate that they are the same organization.
 23. The parent and subsidiary avoid referring to each other as one family, organization, or as divisions of one another.
 24. The equipment and other goods of the parent and subsidiary are separate.
 25. The two companies do not exchange assets or liabilities.
 26. There are no contracts between the parent and subsidiary with respect to purchasing goods and services from each other.
 27. The subsidiary and the parent do not deal exclusively with each other.
 28. The parent does not review the subsidiary's contracts, bids, or other financial activities in greater detail than would be normal for a shareholder who is merely interested in the profitability of the business.
 29. The parent does not supervise the manner in which the subsidiary's jobs are carried out.
 30. The parent does not have a substantial veto power over important business decisions of the subsidiary and does not itself make such crucial decisions.
 31. The parent and subsidiary are engaged in different lines of business.

Krendl & Krendl, *supra* note 9, at 52-55 (footnotes and citations omitted).

86. See, e.g., *Carte Blanche (Singapore) PTE., Ltd. v. Diners Club Intn'l*, 2 F.3d 24 (2d Cir. 1993).

87. See, e.g., *Riddle v. Leuschner*, 335 P.2d 107, 111 (Cal. 1959); *Lowendahl v. Baltimore & O.R. Co.*, 287 N.Y.S. 62, 76 (N.Y. App. Div. 1), *aff'd*, 6 N.E.2d 56 (1936).

88. POWELL, *supra* note 62, at 9.

89. See *id.*

The noxious includes factor (e), where the subsidiary has grossly inadequate capital; factor (h), where the parent holds out its subsidiary as a department or division of the parent or refers to the subsidiary's business or financial obligations as its own; factor (i), which refers to asset-stripping or commingling of parent and subsidiary assets; and factor (k), which refers to dispensing with corporate formalities for the subsidiary.⁹⁰ All of these are considered bad shareholder conduct and add, at the very least, cumulative weight toward piercing the corporate veil.

Factor (f), where the parent pays salaries and expenses or losses of the subsidiary, and factor (g), where the subsidiary does business only with the parent or has no assets except those conveyed to it by the parent, may arouse suspicions of commingling and treating the subsidiary as a department, respectively.⁹¹ Yet it is hard to understand why factor (f) (especially) should be a ground for piercing the corporate veil. If the parent pays salaries or other expenses for the subsidiary, it is actually helping the subsidiary. This indirectly helps the creditors of the subsidiary, whose primary interest is the solvency of the debtor. Why should the parent be stripped of limited liability for financially helping the subsidiary? If the subsidiary is doing business only with the parent, the conduct described in factor (g), the parent may be taking the subsidiary's goods or services at cost or less. That would be noxious conduct, because in that situation, the parent actually would treat the subsidiary as a department or a division and not as profit-making enterprise. But if the parent is paying a fair market value for the subsidiary's goods or services, why is there a reason to complain? Factor (g), thus, seems to be basically neutral. Its relevance depends on the price paid by the parent for the goods or services.

The third grouping focuses on factors relevant to the parent's control over the subsidiary. They belong on a list, if control is considered as either a requirement for, or a factor tending to assist a plaintiff in, piercing the corporate veil. Factor (a), the parent owning all or most of the stock of the subsidiary, shows that the parent has the power to control the subsidiary's activities.⁹² Factor (b), the parent and subsidiary having interlocking directorates, comes closer to showing that the parent actually exercises control over the subsidiary.⁹³ The parent has its own employees in position to make decisions for the subsidiary. Neither factor is actually noxious, but is relevant to the extent that control over the subsidiary is relevant.

B. Intrusive Daily Control

Excessive "control" by the parent over the subsidiary is sometimes said to be a *sine qua non* for piercing the corporate veil of the subsidiary to hold the parent

90. See *id.*

91. See *id.*

92. See *id.*

93. See *id.*

liable. The parent's ability to control the subsidiary is not enough.⁹⁴ The parent always has that, and if that were enough, parents would never have limited liability for the debts of their subsidiaries.⁹⁵ The parent does not excessively control the subsidiary merely by determining its general policies, exercising supervision⁹⁶ or controlling its finances and expenses.⁹⁷ The control required is "domination." This usually means intrusive, hands-on, day-to-day control with the parent often leaving no discretion whatsoever to the subsidiary.⁹⁸ Moreover, courts frequently say that they require domination with respect to the transaction attacked.⁹⁹

In one case, the parent exclusively controlled the subsidiary's bank account, allowed the subsidiary no discretion in buying and merchandising, and arranged insurance and advertising for the subsidiary without consulting the subsidiary.¹⁰⁰ The two companies had common officers and directors, which, by itself, is almost never considered to constitute excessive control.¹⁰¹ The court concluded that this micromanaging was "domination" and satisfied the control requirement for piercing the corporate veil.¹⁰²

In another case, the majority shareholder of the parent so dominated the operations of the entities that he even dictated to the subsidiary's bookkeeper

94. See, e.g., *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 152 (3d Cir. 1988); *Jemez Agency, Inc. v. CIGNA Corp.*, 866 F. Supp. 1340, 1345 (D.N.M. 1994); *Scalise v. Beech Aircraft Corp.*, 276 F. Supp. 58, 62 (E.D. Pa. 1967); *Scott v. AZL Resources, Inc.*, 753 P.2d 897, 901 (N.M. 1988).

95. See, e.g., *Johnson v. Flowers Indus., Inc.*, 814 F.2d 978, 980 (4th Cir. 1987); *United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 691 (5th Cir. 1985).

96. See Carsten Alting, *Piercing the Corporate Veil in American and German Law—Liability of Individuals and Entities: A Comparative View*, 2 TULSA J. COMP. & INT'L L. 187, 228-29 (1995).

97. See *id.*

98. See *Krivo Indus. Supply Co. v. National Distillers and Chem. Corp.*, 483 F.2d 1098, 1106 (5th Cir. 1973); *In re Catfish Antitrust Litig.*, 908 F. Supp. 400, 416 (N.D. Miss. 1995); *Japan Petroleum Co. (Nigeria) Ltd. v. Ashland Oil, Inc.*, 456 F. Supp. 831, 841 (D. Del. 1978).

99. See, e.g., *Radaszewski v. Telecom Corp.*, 981 F.2d 305, 306 (8th Cir. 1992); *American Protein Corp. v. AB Volvo*, 844 F.2d 56, 60 (2d Cir. 1988); *Land v. Midwest Office Tech., Inc.*, 979 F. Supp. 1344, 1349 (D. Kan. 1997); *Fleming Cos., Inc. v. Rich*, 978 F. Supp. 1281, 1303 (E.D. Mo. 1997); *Lane v. Maryhaven Ctr. of Hope*, 944 F. Supp. 158, 163 (E.D.N.Y. 1996); *National Bond Fin. Co. v. General Motors Corp.*, 238 F. Supp. 248, 255 (W.D. Mo. 1964); *Lowendahl v. Baltimore & O.R. Co.*, 287 N.Y.S. 62, 76 (N.Y. App. Div. 1 1936); *B-W Acceptance Corp. v. Spencer*, 149 S.E.2d 570, 576 (N.C. 1966).

100. *Consolidated Sun Ray, Inc. v. Oppenstein*, 335 F.2d 801 (8th Cir. 1964). See also *Krendl & Krendl*, *supra* note 9, at 25.

101. See *Hystro Prods., Inc. v. MNP Corp.*, 18 F.3d 1384, 1390 (7th Cir. 1994); *Steven v. Roscoe Turner Aeronautical Corp.*, 324 F.2d 157, 161 (7th Cir. 1963); *American Protein Corp.*, 844 F.2d at 57; *Northern Ill. Gas Co. v. Total Energy Leasing Corp.*, 502 F. Supp. 412, 417 (N.D. Ill. 1980).

102. *Consolidated Sun Ray*, 335 F.2d at 808.

which bills to pay, when to pay them, and to what extent they should be paid.¹⁰³ The majority shareholder of the parent had complete and exclusive control of the subsidiary's fiscal policy. These circumstances constituted domination and satisfied the control requirement for piercing the corporate veil.¹⁰⁴

One case involved claims asserted by asbestos victims against the parent of a subsidiary engaged in the mining and distribution of asbestos.¹⁰⁵ The parent owned 67.3% of the subsidiary's stock, which is an unusually low percentage for a veil-piercing case, but obviously is high enough to give the parent control over the subsidiary.¹⁰⁶ Nevertheless, the parent placed only three directors on the subsidiary's board, including the parent's chairman.¹⁰⁷ Despite the presence of a mere minority on the subsidiary's board, the Federal District Court for the Eastern District of Pennsylvania found that the parent's control over the subsidiary was "actual, participatory, and pervasive" and thereby satisfied New Jersey's alter ego requirement of dominating control.¹⁰⁸ The parent's chairman wielded complete power over the subsidiary's board, because there was a tacit understanding with the other subsidiary directors never to intervene in the decision-making process.¹⁰⁹ The membership of the parent's chairman on the subsidiary's board resulted in the parent's "omnipresence" in the minds of the subsidiary board members.¹¹⁰ Moreover, the parent told its shareholders that it would take direct management responsibility for the subsidiary's mining operations and would closely scrutinize its capital expenditures. The chairman promised to report back regularly to the parent's shareholders. The subsidiary, the district court concluded, was nothing more than an "operating division" of the parent.¹¹¹

The Third Circuit Court of Appeals reversed, determining that the parent's involvement in the subsidiary's financial and managerial affairs was neither constant nor day-to-day.¹¹² It noted that both parent and subsidiary maintained separate books, records, bank accounts, offices and staff, and that each consulted its own financial advisors, accountants and stockbrokers.¹¹³ It determined that

103. Atlantic Tobacco Co. v. Honeycutt, 398 S.E.2d 641, 645 (N.C. Ct. App. 1990).

104. See *id.* at 645.

105. Craig v. Johns-Manville Corp., No. 82-0321, 1987 U.S. Dist. LEXIS 4075 (E.D. Pa. June 3, 1987), *rev'd*, Craig v. Lake Asbestos of Quebec, Ltd., 843 F.2d 145 (3d Cir. 1988). This case is discussed in Richard S. Farmer, Note, *Parent Corporation Responsibility for the Environmental Liabilities of the Subsidiary: A Search for the Appropriate Standard*, 19 J. CORP. L. 769, 775-79 (1994).

106. See *Craig*, 1987 U.S. Dist. LEXIS at *8.

107. The parent was a United Kingdom corporation and called its chairman the "managing director." *Id.*

108. *Id.* at *52.

109. See *id.*

110. *Id.* at *50.

111. *Id.*

112. Craig v. Lake Asbestos of Quebec, Ltd., 843 F.2d 145, 155 (3d Cir. 1988).

113. *Id.* at 152.

the district court's notion of the parent's "omnipresence" on the subsidiary's board was insufficient to meet the control requirement for piercing the corporate veil.¹¹⁴ "[P]otential control," it said, "is not enough."¹¹⁵

In another case, the United States and the Commonwealth of Massachusetts sought to hold a parent liable for the cost of cleaning the contamination caused by a subsidiary of the New Bedford Harbor and the Accushnet River.¹¹⁶ The court looked closely for suggestions of pervasive control by the parent company over the subsidiary's hazardous waste disposal policies for an indication that the parent company treated the subsidiary as a mere instrumentality; however, it rejected the plaintiff's pleas that the special problems of cleaning up hazardous waste should be addressed by lowering the standards that make affiliated corporations responsible for the obligations of each member of the group.¹¹⁷ The parent, the court noted, used a system where all subsidiaries and operating units deposited cash receipts into individual locked box accounts.¹¹⁸ The parent provided a loan guarantee for the subsidiary, which enabled the subsidiary to obtain lower interest rates on its loans. Loans by the parent to the subsidiary were repaid through intercompany billing instead of formal loan agreements.¹¹⁹ The parent required the subsidiary to seek prior parental approval for large capital expenditures. It caused the subsidiary to change several accounting procedures, and the subsidiary had to submit financial reports to the parent

114. *Id.*

115. *Id.* The court may have been influenced by the fact that the subsidiary had previously operated independently. *See also* LAW OF CORPORATE GROUPS, *supra* note 6, § 11.03.

116. *In re Accushnet River & New Bedford Harbor Proceedings Re Alleged PCB Pollution*, 675 F. Supp. 22 (D. Mass. 1987). This case involved liability for cleaning up hazardous waste sites under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, usually referred as "CERCLA." 42 U.S.C. §§ 9601-15 (1994 & Supp. II 1996). The court declined to forge new theories of parental liability for its subsidiary's obligations. *In re Accushnet River & New Bedford Harbor Proceedings*, 675 F. Supp. at 25-26, 30-35. Other cases are to the contrary. *See, e.g.,* United States v. Nicolet, Inc., 712 F. Supp. 1193 (E.D. Pa. 1989); United States v. Kayser-Roth Corp., 724 F. Supp. 15 (D.R.I. 1989), *aff'd*, 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991); Idaho v. Bunker Hill Co., 635 F. Supp. 665 (D. Idaho 1986). These cases have been widely discussed in the literature. *See, e.g.,* George W. Dent, Jr., *Limited Liability in Environmental Law*, 26 WAKE FOREST L. REV. 151 (1991); Evelyn F. Heidelberg, Comment, *Parent Corporation Liability Under CERCLA: Toward a Uniform Federal Rule of Decision*, 22 PAC. L.J. 854 (1991); Lynda J. Oswald & Cindy A. Schipani, *CERCLA and the "Erosion" of Traditional Corporate Law Doctrine*, 86 NW. U. L. REV. 259 (1992); John S. G. Worden, *CERCLA Liability of Parent Corporations for the Acts of their Subsidiaries*, 30 IDAHO L. REV. 73 (1993); David S. Bakst, Note, *Piercing the Corporate Veil for Environmental Torts in the United States and the European Union: The Case for the Proposed Civil Liability Directive*, 19 B.C. INT'L & COMP. L. REV. 323 (1996); Charles E. Dadswell, Jr., Note, *The Corporate Entity: Is There Life After CERCLA?*, 7 COOLEY L. REV. 463 (1990).

117. *In re Accushnet River & New Bedford Harbor Proceedings*, 675 F. Supp. at 32.

118. *Id.* at 34.

119. *See id.*

during the year.¹²⁰ The subsidiary's logo was changed to include the parent's initials. The parent and subsidiary used the same law firm in much of their litigation. The parent purchased an umbrella insurance policy that covered the subsidiary.¹²¹

The court concluded that the parent's activities did not show an inordinate level of integration and control as to justify piercing the subsidiary's corporate veil.¹²² The centralized cash management system was not the equivalent of the intermingling of funds. The court said that if it were "keeping score," the centralized cash management probably would want to check on the "piercing" side of the ledger.¹²³ The quarterly and annual reports to the parent did not represent an intrusion into the subsidiary's business, as the right of shareholders to be informed is recognized in many public and closely held corporations.¹²⁴ Likewise, shareholder control over significant expenditures is not a disregard of corporate separateness.¹²⁵ The court also concluded that the parent had respected the separateness of the subsidiary in important ways. It noted that the subsidiary actually was not a "shell" corporation, as evidenced by the subsidiary's \$17 million dollar net worth, which was five times more than what it was when the subsidiary had been purchased several years previously. Under the ownership of the parent, the subsidiary had remained profitable. The subsidiary negotiated its own contracts, developed its own customers, arranged its own loans, developed its own budgets, created its own marketing and sales program, hired and fired its own employees, maintained its own financial records and accounts, and regularly conducted board of directors meetings.¹²⁶ Although the parent influenced the philosophy and management of the subsidiary, the court noted that this was true of all majority shareholders.¹²⁷ The court ruled that the circumstances did not justify piercing the corporate veil.¹²⁸

In a Second Circuit case, a corporation with a claim against a New York corporation sought a judgment against the New York corporation's Swedish parents.¹²⁹ The district court fastened legal liability on one of the foreign parents and the subsidiary's veil was pierced at least in part because two of the parents' officers and directors, who were also directors of the subsidiary, came to New York and voted at the subsidiary's board meeting to wind down the subsidiary's affairs, resulting in the subsidiary's default on a contract.¹³⁰ The Second Circuit

120. *See id.*

121. *See id.*

122. *Id.*

123. *Id.*

124. *See id.* at 34.

125. *See id.*

126. *See id.* at 35.

127. *Id.*

128. *Id.*

129. *American Protein Corp. v. AB Volvo*, 844 F.2d 56 (2d Cir. 1988).

130. *See id.* at 62-63.

reversed.¹³¹ Citing the famous *Lowendahl* case, the Second Circuit said, “[c]ontrol is the key.”¹³² The parent must exercise complete domination with respect to the transaction attacked. The Second Circuit found that “[t]he strongest piece of evidence to support control was the existence of the interlocking directorates. This commonplace circumstance of modern business [did] not furnish such proof of control as will permit a court to pierce the corporate veil.”¹³³ Not only did the parent not exert control with respect to the particular contract in question, the subsidiary maintained its own corporate and financial records, held independent board meetings, and maintained separate corporate offices.¹³⁴ Though the parent supplied the subsidiary with working capital from time to time, there was not evidence that the subsidiary received financing specifically for the contract in question. There was no evidence of shareholder misbehavior such as asset-stripping.¹³⁵

In a Fourth Circuit case, employees brought suit against their employer (a subsidiary), its parent, and another subsidiary, claiming that the parent replaced the plaintiffs with younger employees from the other subsidiary, in violation of the Age Discrimination in Employment Act.¹³⁶ The parent, the Fourth Circuit concluded, retained the benefits of limited liability, even though it exercised some control over its subsidiary.¹³⁷ If shareholders were liable whenever they exercised their rightful control, limited liability would become a meaningless fiction, the court reasoned.¹³⁸ The majority shareholder is entitled to exercise the normal incidents of stock ownership, such as the right to choose directors and set general policies, without forfeiting the protection of limited liability.¹³⁹ The court found a parent company can become the employer of a subsidiary’s workers by exercising excessive control in one of two ways. First, it could control the employment practices and decisions of the subsidiary.¹⁴⁰ If it hired and fired the subsidiary employees, routinely shifted them between the two companies, and supervised their daily operations, the parent would then be found to be their employer.¹⁴¹ Second, the parent might dominate the subsidiary’s operations by treating it as its alter ego.¹⁴² The subsidiary might be highly integrated with the parent’s business operations, as evidenced by the commingling of funds and assets, the use of the same workforce and business offices for both corporations, the severe undercapitalization of the subsidiary,

131. *Id.* at 62.

132. *Id.* at 60.

133. *Id.*

134. *See id.*

135. *See id.*

136. *Johnson v. Flowers Indus., Inc.*, 814 F.2d 978, 978 (4th Cir. 1987).

137. *Id.* at 980.

138. *Id.*

139. *See id.* at 980-81.

140. *See id.* at 981.

141. *See id.*

142. *See id.*

and the failure to observe basic corporate formalities such as keeping separate books and holding separate shareholder and board meetings.¹⁴³

The plaintiff produced no evidence that the parent excessively interfered with the subsidiary's business operations.¹⁴⁴ The subsidiary's management was responsible for the daily decisions in vital areas of production, distribution, marketing, and advertising. The subsidiary had a separate board of directors and corporate officers, kept its own business records, and maintained separate bank accounts.¹⁴⁵ Three of the subsidiary's four directors were officers of the parent, and the parent exercised oversight of the subsidiary's activities. However, the court considered those facts to be characteristic of a parent-subsidiary relationship not amounting to domination of the business practices of the subsidiary.¹⁴⁶ In particular, the court found no evidence that the parent controlled the employment practices and decisions of the subsidiary because the parent never hired, fired, promoted, paid, transferred, or supervised any subsidiary employee.¹⁴⁷

In an effort to bring some cohesion to the judicial discussions of control, Blumberg summarizes by noting that the courts' evaluation of intergroup *tort* liability have emphasized four factors: (1) parental participation in daily operations; (2) parental determination of important subsidiary policy decisions; (3) parental determination of subsidiary business decisions while bypassing subsidiary managers; and (4) parental issuance of instructions to the subsidiary personnel or the use of parental personnel in the conduct of the subsidiary affairs.¹⁴⁸ The courts in most cases, however, usually acquiesce in the reality of the exercise of control by the parent and determine the parent's liability on the basis of other factors.¹⁴⁹ Essentially, the courts discuss the exercise of control, but control is not usually the critical question.¹⁵⁰

It would be more accurate to say that piercing the corporate veil is such a confused area of the law that the requirement of control, as with all the other requirements, is treated erratically by the courts. A determination of what constitutes excessive control is a difficult job for a judge because the "separateness" of a parent and subsidiary corporation is formalistic. It is unrealistic to think that a parent and a subsidiary are truly separate, making it hard for a judge to determine when they are not separate. If the subsidiary is treated as an economically viable entity, a higher degree of control by the parent over the subsidiary is tolerated. If something appears amiss, however, such as the manipulation of corporation assets or extensive economic integration, the judge will strictly scrutinize the extensiveness of control. If control is extensive, it will

143. *See id.*

144. *See id.*

145. *See id.* at 982.

146. *Id.*

147. *Id.*

148. LAW OF CORPORATE GROUPS, *supra* note 6, § 10.02.

149. *See id.*

150. *See id.*

be a factor favoring piercing the corporate veil. If control is not extensive, it will be a factor weighing against piercing the corporate veil.

IV. CONTROL AS PROOF THAT A SUBSIDIARY IS THE PARENT'S AGENT

In addition to piercing the corporate veil of the subsidiary to reach the parent, a claimant against the subsidiary may be able to invoke agency principles to reach the parent. Justice Cardozo noted this possibility long ago in *Berkey*,¹⁵¹ stating that "[d]ominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent."¹⁵² If the subsidiary is acting as the parent's agent, the parent may then be held liable under normal agency principles without resorting to piercing the corporate veil.¹⁵³ If a subsidiary corporation acts as an agent for the parent corporation, the parent should be liable for the acts of the agent subsidiary within the scope of the agency.¹⁵⁴ In *Walkovszky v. Carlton*,¹⁵⁵ the court referred to the agency principle of respondeat superior and concluded that a shareholder should be liable when its corporation is acting as its agent.¹⁵⁶ If a corporation is an agent for the shareholders, perhaps there should be no quarrel in making the shareholders liable because a corporation may, like a natural person, be an agent of natural or artificial persons.¹⁵⁷ As the Krendls and Blumberg have pointed out, however, agency requires a consensual undertaking between the parties and rarely arises in piercing the corporate veil, because the subsidiary typically is acting in its own behalf, not on behalf of its parent or with the intent of binding its parent.¹⁵⁸

Nevertheless, several cases, especially in New York, have used agency principles to make the parent liable for the debts of the subsidiary.¹⁵⁹ By finding

151. *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (1926).

152. *Id.*

153. See, e.g., Robert C. Downs, *Piercing the Corporate Veil—Do Corporations Provide Limited Personal Liability?*, 53 UMKC L. REV. 174, 190-91 (1985); *Liability of a Corporation for Acts of a Subsidiary or Affiliate*, 71 HARV. L. REV. 1122, 1123 (1958).

154. See, e.g., *Solar Int'l Shipping Agency, Inc. v. Eastern Proteins Export, Inc.*, 778 F.2d 922 (2d Cir. 1985); *Publicker Indus., Inc. v. Roman Ceramics Corp.*, 603 F.2d 1065 (3d Cir. 1979); *Acme Precision Prods., Inc. v. American Alloys Corp.*, 422 F.2d 1395 (8th Cir. 1970), *remanded*, 347 F. Supp. 376 (W.D. Mo. 1972), *rev'd on other grounds*, 484 F.2d 1237 (8th Cir. 1973); Downs, *supra* note 153, at 191.

155. 223 N.E.2d 6 (N.Y. 1966).

156. *Id.* at 7-8.

157. See NORMAN D. LATTIN, *THE LAW OF CORPORATIONS* ch.1 § 14 (1959).

158. See *LAW OF CORPORATE GROUPS*, *supra* note 6, § 6.06.1; Krendl & Krendl, *supra* note 9, at 3 n.9. See also *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265, 267 (2d Cir. 1929).

159. See *AFP Imaging Corp. v. Ross*, 780 F.2d 202, 204 (2d Cir. 1985); *Glacier Gen. Assurance Co. v. G. Gordon Symons Co., Ltd.*, 631 F.2d 131, 134 (9th Cir. 1980); *Rapid Transit Subway Constr. Co. v. City of New York*, 182 N.E. 145, 150 (N.Y. 1932); *Whitehurst v. FCX Fruit*

that the subsidiary is the agent of the parent and is acting within the scope of its agency, the court obviates the necessity of piercing the corporate veil. This may make an easier case for a plaintiff by relieving the need to overcome the frequently expressed judicial reluctance to pierce the corporate veil. Moreover, though the plaintiff would need to show domination to establish the principal-agent relationship, there would be no need to satisfy the other elements of piercing the corporate veil, e.g., the "fraud or wrong-injustice" test proposed by Powell.

However, it is more common for courts mentioning agency to merely list it as one of the numerous conclusory metaphors for piercing the corporate veil.¹⁶⁰ The courts are often plainly confused, using agency as a synonym for instrumentality in one paragraph and then in its correct sense in another.¹⁶¹ For example, in an Idaho case,¹⁶² the court used a corporate veil-piercing/alter ego analysis to reject the plaintiff's product liability claim against the parent of a sailboat manufacturer.¹⁶³ There was nothing unusual in its analysis. In dissent, however, one justice first clearly stated agency principles as a method for making a parent liable for its subsidiary's obligations.¹⁶⁴ He stated that a parent may be liable for the actions of its wholly-owned subsidiary regardless of whether the subsidiary's separate corporateness is recognized.¹⁶⁵ Where the subsidiary is dominated by the parent, he said, separate corporate entities might be recognized, treating the parent as principal and the subsidiary as agent, thus making the acts of the subsidiary in effect the acts of the parent.¹⁶⁶ The parent's liability may be premised upon the actions of the subsidiary under agency principles.¹⁶⁷ In the next paragraph, just as clearly, the justice iterated typical alter ego phraseology, saying that the corporate identity may be disregarded where there is such a unity of interest and ownership that the separate personalities of the corporation and shareholder no longer exist and where an inequitable result would ensue if the separate personality is not disregarded.¹⁶⁸ Returning to agency principles, and quoting from Justice Cardozo in *Berkey*, he stated that dominion may be so complete that the general rules of agency should apply.¹⁶⁹ Further garbling his analysis, he next discussed an environmental case where liability attached because the parent had the capacity to control and profited exclusively from the

& Vegetable Serv. Inc., 32 S.E.2d 34, 40 (N.C. 1944); *Elvalsons v. Industrial Covers, Inc.*, 525 P.2d 105, 111-12 (Or. 1974); LAW OF CORPORATE GROUPS, *supra* note 6, § 6.06.

160. See LAW OF CORPORATE GROUPS, *supra* note 6, § 6.06.2; FLETCHER ET AL., *supra* note 11, § 43; LATTIN, *supra* note 157, ch.1, § 14; Krendl & Krendl, *supra* note 9, at 3 n.9.

161. See Krendl & Krendl, *supra* note 9, at 3 n.9.

162. *Ross v. Coleman Co., Inc.*, 761 P.2d 1169 (Idaho 1988).

163. *Id.*

164. *Id.* at 1197.

165. *Id.*

166. See *id.*

167. See *id.*

168. *Id.* He then used the terms "alter ego," and "mere instrumentality." *Id.*

169. *Id.* at 1198.

actions of its subsidiary.¹⁷⁰ The justice ended his analysis by again referring to alter ego principles in one paragraph and agency concepts in the next paragraph.¹⁷¹

What should be made of the agency argument as a rationale for making one corporation responsible for the obligation of another corporation within its affiliated group? First, most of the cases mentioning agency are really corporate veil-piercing cases and apply the Powell instrumentality test or the California alter ego test, not agency principles. These indiscriminate references to agency principles are at best superfluous in an attempt to bolster the argument. At worst, they are confounding, as demonstrated by the Idaho Supreme Court justice's confusion.¹⁷²

Second, some cases, notably in New York, have followed Justice Cardozo's lead in *Berkey*, finding that an excessive degree of intrusive control over a subsidiary—particularly over its daily operations—makes the subsidiary an agent for its parent and, therefore, its parent liable as the subsidiary's principal.¹⁷³ The importance of this rationale is that a claimant need only show control to attach liability to the parent for the subsidiary's obligations. The plaintiff would not be required to prove anything supplemental, such as unfairness or fraud.

Is this a good, helpful analysis that could prove useful in deciding these cases? This author does not think so. A better analysis would be that intrusive control by the parent makes the parent itself the actor in the transaction. By dint of its intrusive control the parent is committing the wrongs complained of by the plaintiff. There would be no need to resort to the doctrine of respondeat superior to make the parent liable because the parent is committing the wrongful act by itself. The parent could be held directly liable without using agency principles (or without piercing the corporate veil). The relationship does not involve the subsidiary acting as an agent for the parent; the parent is acting for itself. Such an analysis might have an unfortunate policy result, however, by inducing the parent to refrain from paying close attention to its subsidiaries' conduct.

Third, in those instances when an agency relationship actually exists between a parent and a subsidiary, and the subsidiary acts within the scope of its agency, there is a valid obligation created upon the parent. In one case, the court said that a jury could determine that a parent was liable on an agency theory if (1) the

170. *Id.* The case discussed was *Environmental Protection Department v. Ventron Corp.*, 440 A.2d 455 (N.J. Super. Ct. App. Div. 1981).

171. *Ross*, 761 P.2d at 1199.

172. A federal judge has noted the confusion caused by using the term "agent" in corporate veil-piercing cases. See *Mobil Oil Corp. v. Linear Films, Inc.*, 718 F. Supp. 260, 266 n.9 (D. Del. 1989).

173. See LAW OF CORPORATE GROUPS, *supra* note 6, § 6.06.2. See also *supra* note 159 and accompanying text. Other jurisdictions that have referred to agency principles include Connecticut, Montana, South Dakota, and the Fifth Circuit. See, e.g., *Krivo Indus. Supply Co. v. National Distillers & Chem. Corp.*, 483 F.2d 1098 (5th Cir. 1973); *Zaist v. Olson*, 227 A.2d 552 (Conn. 1967); *Hando v. PPG Indus., Inc.*, 771 P.2d 956 (Mont. 1989); *Glanzer v. St. Joseph Indian Sch.*, 438 N.W.2d 204 (S.D. 1989).

parent manifested that the subsidiary would act for the parent as the parent's agent, (2) the subsidiary accepted the undertaking, and (3) the parties understood that the parent was in control of the undertaking.¹⁷⁴ For example, a manufacturing corporation could incorporate a subsidiary to act as its agent for distributing its manufactured products to wholesalers. Parent and subsidiary could clearly delineate the agency relationship to the customers. If the parent failed to fill an order taken by the subsidiary as its agent, the parent would be liable for the breach of contract.

It must be noted that there are few cases with such a clearly demarcated principal-agent relationship.¹⁷⁵ A well-advised entity might not find much of a reason to use a subsidiary as a sales agent, if the parent is going to be liable anyway. It might avoid the extra complexity and bookkeeping by using its own sales department rather than a subsidiary. Or if it does use a subsidiary, it would be better advised to avoid clearly delineating a principal-agent relationship between itself and its subsidiary. Instead, it should tell the subsidiary to act as if it is an independent distributor and not as an agent. Informally, the subsidiary probably would feel like it is really only an agent for the parent (and the actual sales people working for the subsidiary may make the mistake of saying they work for the parent), but form often wins the day in corporate law and probably no one would conclude that an agency relationship exists.

If, as usually is the case, there is no formal agency relationship between the parent and the subsidiary, the subsidiary may still, in all practicality, be acting as the parent's agent. It is hard to see why the plaintiff should not be allowed to try to prove such a relationship. If the subsidiary is indeed an agent of the parent, the parent as principal should be made liable for the subsidiary's acts. One almost has to believe that the analysis in this situation would probably replicate that needed in the instrumentality and alter ego cases, and the confusion would remain. Additionally, full-scale adoption of an implied agency rationale might mean more liability for parent corporations. In all likelihood, states do not want such an increase in liability.¹⁷⁶ Blumberg and other commentators want to eliminate limited liability for corporate groups,¹⁷⁷ though one might speculate that even they may not welcome what may be merely an incremental increase in liability and the likely accompanying confusion in the courts.

V. CONTROL THAT MAKES THE PARENT DIRECTLY LIABLE RATHER THAN VICARIOUSLY LIABLE (PARENT AS A DIRECT OBLIGOR)

Courts using the Powell analysis almost always require "complete

174. *Glanzer v. St. Joseph Indian Sch.*, 438 N.W.2d 204, 207-08 (S.D. 1989).

175. *See, e.g., NLRB v. Deena Artware*, 361 U.S. 398 (1960); *Ross v. Coleman Co., Inc.*, 761 P.2d 1169 (Idaho 1988); *Pennsylvania Eng'g v. Islip Resources Recovery Agency*, 710 F. Supp. 456 (N.Y. 1989).

176. *See supra* notes 34-36 and accompanying text.

177. *See supra* notes 19-24 and accompanying text.

domination . . . in respect to the transaction attacked.”¹⁷⁸ If the parent exerts intrusive control over the transaction in question, perhaps, as noted above, the parent is making itself an actor in the transaction and can be deemed the party that is committing the wrongful act by itself. Therefore, it may be possible to hold the parent directly liable without piercing the corporate veil (or resorting to agency principles).

This analysis tends to fail in contract cases. Nothing in contract law says that intrusive parental control over the subsidiary, even for the contract in question, makes the parent liable on a contract that specifies the subsidiary as the contractual obligator. Indeed, it is not unusual at all that someone who is not a party to a contract exerts dominating and intrusive influence on a contracting party and still is not made liable on the contract. Obvious examples are the highly publicized contracts between sports franchises and athletes. Agents/advisors regularly exert dominating control over negotiations for their clients, yet no one suggests that the agents/advisors are personally liable on the contract. This is not to say that an intrusively dominating party cannot get itself into trouble. With so much power over the contracting party, the dominating party probably has a fiduciary duty which that party may breach. The controlling party may not keep its mouth completely closed, allowing any representations it makes to evolve into misrepresentation. This creates opportunities for actionable misrepresentations. A relatively common problem occurs when the parent creates confusion for the other contracting party as to whether the subsidiary or the parent is the contracting party on its side of the deal. Under a fraud or misrepresentation theory, the other contracting party may have a direct action against the parent.¹⁷⁹

A somewhat similar problem regarding parents and subsidiaries is the use of a common public persona where the affiliated corporations are held out to the public as a single enterprise.¹⁸⁰ Persons dealing with a subsidiary may be misled into thinking they are doing business with a group or with the parent. This can be a ground for piercing the corporate veil,¹⁸¹ but confusion as to the identity of the obligor on the contract also may result in making the parent the obligor on the contract. If the parent represents that it stands behind or considers itself liable for the obligations of its subsidiary, it likely will be estopped from denying liability.¹⁸² If the parent leads a plaintiff to reasonably believe that the parent is a party to the contract, it also may be held liable on the contract.¹⁸³ If the parent misleads the other contracting party as to the credit worthiness of its subsidiary,

178. See *supra* note 99 and accompanying text.

179. See LAW OF CORPORATE GROUPS, *supra* note 6, § 19.21. See, e.g., *Carnival Cruise Lines, Inc. v. Oy Wartsila Ab*, 159 B.R. 984 (S.D. Fla. 1993); *Stacey-Rand, Inc. v. J.J. Holman, Inc.*, 527 N.E.2d 726 (Ind. Ct. App. 1988); *Hideca Petroleum Corp. v. Tampimex Oil Int'l, Ltd.*, 740 S.W.2d 838 (Tex. Ct. App. 1987).

180. See LAW OF CORPORATE GROUPS, *supra* note 6, § 19.08

181. See, e.g., *FMC Fin. Corp. v. Murphree*, 632 F.2d 413 (5th Cir. 1980).

182. See LAW OF CORPORATE GROUPS, *supra* note 6, § 19.18.

183. See *id.*

the parent may be liable on the contract.¹⁸⁴ These instances of contract liability are not based on control, though control is almost always present in these cases. The plaintiff should be able to make the parent liable on the contract without having to pierce the corporate veil of the subsidiary, due to the existence of an independent basis for making the parent directly liable on the contract, such as misrepresentations or the parent making itself a de facto contracting party.

However, these types of misconduct help a plaintiff pierce the corporate veil. The wrongful conduct satisfies the wrongful or inequitable conduct requirement for both the instrumentality and alter ego tests. Also, there is likely a causal relationship between the wrongful conduct and the plaintiff's problem, especially in the cases involving some sort of misrepresentation, thereby satisfying the causation element in jurisdictions requiring a causal connection for piercing the veil.

Torts present a much different analysis. If a parent exerts complete control of the subsidiary, can it be said that torts committed by the subsidiary are really being committed by the parent, who by virtue of its complete domination, is the real actor? Perhaps. One potential problem for the parent occurs when the parent provides safety services to its subsidiary. It is then possible to predicate limited liability against the parent based on the Good Samaritan Doctrine as set forth in the Restatement (Second) of Torts.¹⁸⁵ Under this theory, liability can attach to the parent if it undertakes to provide safety services and thereafter performs those services negligently.¹⁸⁶ The parent can create a duty for itself, and therefore potential liability, by inspecting a subsidiary's plant for potential safety problems or by inspecting specific machines or instruments.¹⁸⁷ Several cases have imposed liability on a parent where its inspection of the subsidiary's premises disclosed unsafe conditions went uncorrected.¹⁸⁸ In some cases, courts have imposed direct tort liability on a parent when an employee/officer of the parent made a critical decision which resulted in tort liability.¹⁸⁹ Often, however, that person has a position with both the parent and the subsidiary, and the court is likely to decide that the wrongful act was committed while the person was acting on behalf of the subsidiary instead of the parent. Consequently, the parent is exculpated from direct tort liability.¹⁹⁰ This is a formalistic result, but again, form often wins out in corporation law.

184. See *id.*

185. RESTATEMENT (SECOND) OF TORTS § 324A (1965).

186. See N. Stevenson Jennette, III, *Providing Safety Services to Subsidiaries: A Liability Trap for Parent Corporations*, 3 DET. C.L. REV. 713, 716 (1990).

187. See *id.*

188. See, e.g., *Johnson v. Abbe Eng'g Co.*, 749 F.2d 1131 (5th Cir. 1984); LAW OF CORPORATE GROUPS, *supra* note 6, § 14.05.4.

189. See *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 526 (Del. 1987); LAW OF CORPORATE GROUPS, *supra* note 6, § 10.02 (Supp. 1997).

190. See, e.g., *United States v. Jon-T Chems., Inc.*, 768 F.2d 686, 691 (5th Cir. 1985); *Alting*, *supra* note 96, at 228-29.

VI. CONTROL AND FRAUDULENT CONVEYANCE LAW

In a provocative work, Robert Charles Clark postulates that the “ancient” body of law known as the law of fraudulent conveyances could provide a useful framework for resolving issues that are now analyzed under the jurisprudence of piercing the corporate veil, the equitable subordination doctrine, and the dividend statutes.¹⁹¹ Fraudulent conveyance law contains principles and rules that are easy to grasp and have fairly definite meaning when applied to real cases. Clark contends that many, if not most, veil-piercing cases are simply substitutes for fraudulent conveyance actions.¹⁹² The problem consists of the corporation, that is, the managers, who are usually also the shareholders in closely held corporations, taking steps to increase the riskiness of the loan after the terms have been already set. This offensive conduct, called the problem of supervision, largely provides the context of both fraudulent conveyance law and piercing the corporate veil.¹⁹³ Thus, although academics have long been enamored by the issue of the adequacy of initial capitalization,¹⁹⁴ the crux of most of the cases is self-dealing on the eve of insolvency. “As is often said,” Clark repeats, “a fraudulent conveyance is but a reflex of an insolvent man.”¹⁹⁵ That form of noxious behavior on the brink of insolvency has been the focus of litigation and legal doctrine for both veil-piercing and fraudulent conveyance.

Clark, it seems, presupposes control. For who besides those in control has the power on the eve of insolvency to remove assets out of the corporation and to place them beyond the reach of corporate creditors? However, control, by itself, does not suffice as a basis. Instead, it is the wrongful conduct since the shareholders cannot be penalized for exercising control. Thus, the shareholders would only lose out if they had engaged in unacceptable behavior.

VII. CONTROL AS A FACTOR FOR PIERCING CORPORATE VEIL PROVIDES DISINCENTIVE FOR CAUTIOUS BEHAVIOR

Virtually all of the cases on this issue discuss control as a factor for piercing the corporate veil of a subsidiary.¹⁹⁶ Control also has been made an important factor in some of the CERCLA cases where the exertion of control by a parent

191. ROBERT CHARLES CLARK, CORPORATE LAW § 2 (1986).

192. *Id.* § 2.4.

193. *See id.* § 2.4 n.5 (citing Richard A. Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. CHI. L. REV. 499 (1976)).

194. *See id.*

195. *Id.* Clark asks whether inadequate capitalization by itself leads to piercing the corporate veil. A careful review of the caselaw says, “[v]ery rarely, if at all. But many courts do consider it a relevant factor.” *Id.* § 2.41 (citing *Gray v. Kenneth R. Ambrose, Inc.*, 727 F.2d 279 (3d Cir. 1983)). Clark opines that judges have experimented with the notion of requiring an affirmative duty to capitalize corporations, but as the near absence of cases basing piercing solely on inadequate capitalization shows, the courts have not gone far toward that notion. *Id.*

196. *See* PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS: STATUTORY LAW § 2.02.3 (1989).

over a subsidiary makes the parent the “operator” of a hazardous waste site owned by its subsidiary. This status of “operator” is sufficient to invoke liability under the statute.¹⁹⁷ One justification for the imposition of this type of liability is the tort-like principle that the party causing the harm ought to be held accountable for the injuries thereby inflicted.¹⁹⁸ The normal predicate for imposing vicarious liability upon the principal for a tort committed by an agent is that the principal had control over the agent’s physical activities.¹⁹⁹ With regard to the potential liability of the shareholders of publicly held corporations, where power is vested in the board and the officers rather than in the public shareholders, that predicate is missing. It is not missing, however, in the case of a parent that has full control over its subsidiary.²⁰⁰ Hansmann and Kraakman propose that shareholder liability should be seen as a standard problem of tort law more than a problem of corporate law.²⁰¹ Underlying this theory and analysis is the normative assertion that those persons who stand to benefit from the activities of an enterprise should bear its costs, including tort costs.²⁰² The emphasis on control places the focus on the party who caused the injury. The wrongdoer was the one with control; therefore, the one in control should suffer the costs.²⁰³

The law and economics scholars, one would think, would not consider control a relevant factor for removing limited liability. Instead, they would posit that a cost-benefit analysis reveals that limited liability produces a net gain for society as a whole.²⁰⁴ Assuredly, they know that majority shareholders have control over their corporations. Also on the side of limited liability are the judges who take to heart the concept of the corporation as a separate entity, perhaps unduly so. For example, some judges are unwilling to make a parent liable for wrongs by the subsidiary when the individual wrongdoer is an officer of both the parent and the subsidiary, but is wearing his or her subsidiary “hat” and not his or her parent “hat” when he commits the wrong.²⁰⁵ Clearly, the emphasis is heavily on form: In the “hat” cases, not only does the parent have the power to exert control over the subservient corporation, it is actually doing it.

While there is little merit in slavish adherence to the concept of a corporation as a legal entity and the “hats” worn by one of its managers, there is merit in both of the conflicting rationales at play here: making parties accountable for the wrong that they do versus limited liability producing a net gain for society.

197. CERCLA § 196(a)(2), 42 U.S.C. § 9607(a)(2) (1994).

198. See, e.g., Hansmann & Kraakman, *supra* note 8, at 1916.

199. See LAW OF CORPORATE GROUPS, *supra* note 6, § 14.03; CARY & EISENBERG, *supra* note 6, at 186; Thompson, *supra* note 38, at 39.

200. See CARY & EISENBERG, *supra* note 6, at 186-87.

201. Hansmann & Kraakman, *supra* note 8, at 1916.

202. See *id.*; see also CARY & EISENBERG, *supra* note 6, at 187.

203. See Hansmann & Kraakman, *supra* note 8, at 1916.

204. See, e.g., Presser, *supra* note 7, at 150.

205. See *supra* note 190 and accompanying text.

However, making control the fulcrum for deciding a parent's liability produces a problem: A parent may choose to avoid exercising control over its subsidiary in order to ensure that its liability remains limited. Indeed, that is exactly the advice that some lawyers give to their corporate clients. This became especially true after several CERCLA cases held that exerting control made a parent the operator of its subsidiary's hazardous waste facility.²⁰⁶ For example, one author posits that a lawyer has two ways of minimizing the impact of environmental risk on a corporation's bottom line.²⁰⁷ The first is for the lawyer to tell the parent that it could significantly limit the impact of environmental risks merely by establishing a subsidiary corporation to conduct the hazardous waste activities.²⁰⁸ The second is that the corporate lawyer could attempt to directly influence the distribution of environmental risks for the corporation by advising the parent to employ risk prevention strategies.²⁰⁹

The first is a traditional strategy frequently used by corporate lawyers. By avoiding behavior that causes the veil to be pierced under traditional veil-piercing doctrine, the parent corporation can stake a strong claim to insulation from the subsidiary's liabilities.²¹⁰ Proper behavior, the author notes, includes "*avoiding direct oversight of operations* (especially hazardous waste decisions)."²¹¹ The author noted that many corporate lawyers today continue to view the risk-insulating approach as a viable method of limiting environmental liabilities.²¹²

However, the author prefers the second lawyering strategy of directly influencing the distribution of environmental risks through a risk prevention strategy. Under this approach, the parent can minimize environmental risks by overseeing the production process to ensure that the costs of production and the creation of environmental risks are appropriately balanced. A lawyer seeking this objective could recommend, for example, regular environmental audits or the establishment of other structural mechanisms for oversight of environmental risks.²¹³

The author noted that the first approach of merely suggesting establishment of a subsidiary has the "advantage" for the lawyer of requiring relatively little

206. See, e.g., *United States v. Bestfoods*, 118 S. Ct. 1876, 1887 (1998) (holding that veil-piercing is necessary to hold a parent derivatively liable as the operator of a subsidiary's facility unless the parent's conduct is so specifically related to the hazardous waste activity that it should be considered the operator of the hazardous waste facility).

207. Peter S. Menell, *Legal Advising on Corporate Structure in the New Era of Environmental Liability*, 1990 COLUM. BUS. L. REV. 399, 402 (1990).

208. See *id.* at 402-03.

209. See *id.* at 403.

210. See *id.* at 404-05. The parent should adequately capitalize the subsidiary to ensure proper record-keeping, not siphon funds excessively from the subsidiary, and observe corporate formalities of the subsidiary. See *id.*

211. *Id.* (emphasis added).

212. *Id.* at 406 & n.25.

213. See *id.* at 403.

knowledge or effort to learn about the client's business.²¹⁴ Mere general knowledge of corporate law would suffice. In contradistinction, the objectives of a risk prevention strategy could not be implemented without understanding much about the nature of the client's business, including such things as the potential effects of risk reduction approaches on consumer demand for products, availability of investment funds, and worker and community relations.²¹⁵ It is not difficult to determine which of the two approaches most lawyers would select. Should a parent really be made to disengage itself from addressing safety issues in its wholly owned subsidiary, upon pain of losing limited liability? Lawyers find this advice suitable for all types of corporate activity and not just for CERCLA. In one article the author, a practitioner, gives the following corporate law advice:

*Do not let a parent corporation official participate in the day-to-day management of the subsidiary corporation.

*Do not let a parent corporation official become personally involved with, or direct, the subsidiary's safety operations.

*Do not have the parent corporation agree to provide "comprehensive safety services" or "accident prevention services" to the subsidiary.

*Have the subsidiary corporation create its own safety organization, including an insurance department and safety and loss prevention department.

*Ensure that the subsidiary corporation's management is in charge of overall safety operations, and appoints a named safety coordinator or director.

*If a parent corporation provides safety suggestions or guidelines to the subsidiary, these guidelines should explicitly state that the subsidiary's management, and *not* the parent corporation, is responsible for implementing any safety suggestions or guidelines presented by the parent corporation.

*If a parent corporation must inspect a subsidiary's facility, it should keep its necessary inspections brief and, if possible, limit them to routine checks for compliance with OSHA regulations.

*Do not inspect the subsidiary's plant alone; take members of the subsidiary's safety team along.

*Do not represent that the parent corporation's inspections are for the purpose of "alerting" the subsidiary corporation or the subsidiary corporation's employees to safety hazards.

*Do not represent, orally or in writing, that the parent corporation's safety inspections are for the purpose of relieving the subsidiary corporation of safety responsibility. In fact, state the opposite in writing.

*Do not let the employees of the subsidiary corporation know that

214. *Id.*

215. *See id.* at 403-04.

the safety inspections took place.

*Do not accept payment for the parent corporation's safety inspections.

*If a parent corporation must review accident reports or accidents at the subsidiary's plant, take along a member of the subsidiary's safety organization.

*If a subsidiary's maintenance records are reviewed, do so in conjunction with a member of the subsidiary's safety organization.

*If any suggestions are rendered as the result of any inspections or investigations made by the parent corporation, offer them as "general safety suggestions"—*not* as suggestions specific to an accident or injury.²¹⁶

This advice comes about as the result of saying that control is a factor leading to liability for the parent. Do we want lawyers to be giving advice like this? Even in the popular press it has been mentioned that a parent makes a mistake by admitting in a tort case that it exercised control over the subsidiary that engaged in the wrongful conduct. For example, following the catastrophic explosion in Bophal, India in 1984, the *Wall Street Journal* reported that lawyers for the victims were nearly gleeful from comments by Union Carbide that it exerted control over its Indian subsidiary:

"We were delighted by their statements," says David Jaroslawicz, a personal injury lawyer who has filed a \$20 billion suit against Union Carbide in New York. The company's efforts to compare safety standards in the Indian plant with those in its West Virginia facility, including statements that safety standards were set by company headquarters in the US, "practically decide the question"

* * *

[To counter such damaging admissions,] a Union Carbide spokesman [said], "We've said they (the Indians) operated the plant from the beginning."²¹⁷

In another case, the estate of racecar driver Mark Donohue sued Goodyear Tire & Rubber Co., a United States company, because a Goodyear tire blew out during one of Donohue's races.²¹⁸ Donohue's attorneys were presented with the problem that the tire had actually been manufactured by a wholly-owned subsidiary situated in the United Kingdom. Goodyear, however, had an even bigger problem, because the company's press releases and annual reports indicated a great degree of control over the British operation from the United

216. Jennette, *supra* note 186, at 724-25.

217. James B. Stewart, *Suits Against Union Carbide Raise Issues for Lawyers, Multinationals*, WALL ST. J., Dec. 17, 1984, at 37.

218. See Richard Greene, *Peeking Beneath the Corporate Veil*, FORBES, Aug. 13, 1984, at 58.

States. Goodyear's former chief executive tried to distance the United States parent company from its United Kingdom subsidiary by arguing that the United States headquarters had no control over the subsidiary. His apparent dissembling did not deceive the trial court judge, however, who allowed the estate to pierce the United Kingdom corporation's corporate veil to get to the United States parent.²¹⁹

The current law is producing the wrong incentive, because it encourages parents to avoid exerting control over its subsidiaries. Competent lawyers are warning managers, "Stay away from the subsidiary, especially safety issues and hazardous waste site problems, or the courts will hold you liable." Do we really want managers to intentionally avoid pressing issues that affect their subsidiaries? The better policy is to let parents use sound business judgment regarding the operations of their subsidiaries. Parents should be encouraged to impose safety standards for their subsidiaries and to send their officers to inspect the subsidiaries' facilities. The subsidiaries are the parent's property just as much as any other assets held by the parent in its own name. Assuredly, the parent does not want the subsidiary's plant to suffer destruction. Attention is far more likely to ensure that the subsidiary run a safe ship than does inattention. The parent's shareholders presumably do not want any corporate property to be destroyed.

VIII. THE LANDERS MODEL OF A WELL-BEHAVED CORPORATE GROUP

Jonathan M. Landers describes the type of behavior that a putative, thoughtful legislature, which accepts limited liability as the norm for corporate groups, would expect from a corporate group to preserve limited liability for its constituent membership.²²⁰ Such a legislature would permit separate incorporations with its intended privilege of limited liability to encourage an existing business to expand into a new field, to permit the insulation of parts of the business from risks of other parts of the business when the separate areas might exist as an independent entity, and to satisfy legal or administrative requirements.²²¹ An attempt to divide one business into a number of mutually dependent units would probably not be a proper basis for bestowing limited liability in each member of the group.²²² Various types of abusive behavior, such as placing assets in one company and liabilities in another, would not be a justifiable basis for limited liability either.

In addition to requiring a justifiable basis for separate incorporation, the

219. *Id.*

220. Landers, *supra* note 6, at 620-22. Like the works of Professor Blumberg, Landers does not support limited liability for members of an affiliated group. He favors enterprise liability, meaning that a parent should be liable for the obligations of its subsidiaries without the necessity of piercing the subsidiary's corporate veil. *Id.* at 617. The actual focus of the Landers article, however, is the issue of equitable subordination in bankruptcy.

221. *See id.* at 621.

222. *See id.*

model would require both economic viability and the observance of procedural formalities.²²³ First, each member of the affiliated group must have adequate capitalization to carry out its intended business.²²⁴ Second, the affiliated group must be organized and managed to ensure that each member of the group has a realistic potential for profitability.²²⁵ For example, in one case a subsidiary was forced to pay its parent management fees equal to its net earnings.²²⁶ This was not acceptable behavior. Third, the subsidiary cannot be excessively dependent on the parent.²²⁷ It would be unacceptable if the subsidiary's sole function was to service the parent and investors would be unlikely to organize an independent, free-standing corporation to engage in those same transactions.²²⁸ Fourth, the parent should treat its subsidiary as a separate entity.²²⁹ This means that the corporate formalities must be observed, assets and properties must not be commingled, and the public image of the subsidiary as a separate corporation must be preserved.²³⁰ In summation, these putative legislatures would expect each member of the affiliated group to be treated as if it was an economically viable, free-standing corporation.

IX. THE PROPOSAL

A. Retain Limited Liability as the Norm for Members of an Affiliated Group of Corporations

As discussed above, this author supports limited liability as the norm, both generally and more specifically, for the members of an affiliated group of corporations. This may not be more than a normative judgment, but this author suspects that the granting of limited liability to a parent corporation encourages investment and economic development, producing a net benefit for society as a whole.

B. Delete Control as a Factor for Piercing the Corporate Veil

Control should not be a factor in the tests for stripping the parent of its limited liability. Though this may be contrary to the tort principle of making an actor responsible for its own conduct, the emphasis on control induces parent corporations to steer clear of health and safety issues affecting its affiliates. This undesirable behavior is the opposite of what the law should encourage.

223. *See id.*

224. *See id.*

225. *See id.*

226. *Joseph R. Foard, Co. v. Maryland*, 219 F. 827 (4th Cir. 1914).

227. *See Landers, supra* note 6, at 622.

228. *See id.*

229. *See id.*

230. *See id.*

*C. Use of the Landers Model of a Well-Behaved Corporate Group as
a Prerequisite for the Parent's Limited Liability*

Adherence to the Landers model of proper behavior for a corporate group should be a prerequisite for sustaining the parent's limited liability. In a nutshell, the model requires that the parent structure the subsidiary so that it has a realistic potential for profitability. More particularly, the parent should adequately capitalize its subsidiary, avoid treating it as a department or a division, and avoid commingling or stripping its assets. Though the standard of conduct may not comport with the group's dominant motivation, which is to maximize a return for the enterprise as a whole, this author is willing to take the normative stance that adherence to this informal code of good conduct is the price that a parent corporation should be required to pay to preserve its limited liability. The law can say, "Treat your subsidiary like an independent, profit-making enterprise, and we will give you limited liability. That is what we ask of other corporations, and we ask it of you, too." Creditors should not be able to require any more than that.

NOTES

HOUSING DISCRIMINATION AND SOURCE OF INCOME: A TENANT'S LOSING BATTLE

KIM JOHNSON-SPRATT*

INTRODUCTION

Many believe that housing discrimination is a past wrong that is now corrected by the Fair Housing Act of 1968.¹ Nothing could be further from the truth. Housing discrimination against the poor is still permissible in many realms under current law. The poor in this country often cannot obtain adequate housing and can be forced to move their families into unsafe neighborhoods or find themselves homeless. Finding adequate housing can be a poor family's losing battle, as the law does not protect the family from discrimination. More specifically, a prospective tenant's source of income alone can serve as a justification for a landlord's refusal of tenancy. Sources of income that become tools of discrimination include Social Security, unemployment compensation, alimony, child support, and food stamps.

However, two sources of income are particularly unprotected by federal housing law: Section 8 of the Low-Income Housing Act² ("Section 8") and Temporary Assistance for Needy Families ("TANF").³ Those who participate in the Section 8 Voucher and Certificate Programs⁴ can be turned away by private landlords merely because of this source of income. The Certificate Program created by the Housing and Community Development Act of 1974⁵ allows certificate holders to pay only thirty percent of their income for a privately-owned apartment.⁶ Landlords are then reimbursed for the difference

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1. 42 U.S.C. §§ 3601-3619, 3631 (1994 & Supp. II 1996).

2. *Id.* §§ 1437 to 1437aaa-8.

3. *Id.* § 601 (Supp. II 1996) (formerly enacted as Aid to Families with Dependent Children ("AFDC"), ch. 257, 58 Stat. 277 (1994)).

4. *Id.* §§ 1437 to 1437aaa-8.

5. Pub. L. No. 93-383, 88 Stat. 683 (Aug. 22, 1974) (codified as amended at 42 U.S.C. §§ 1437-37(x); 1471-90g; 5301-16; 5401-26 (1994 & Supp. II 1996)).

6. 42 U.S.C. § 1437f (1994 & Supp. II 1996).

between the tenant's contribution and the rental cost.⁷ The Voucher Program allows more flexibility as vouchers are given to the tenants for the difference between the fair market rent in the tenant's geographical area and thirty percent of the tenant's income.⁸ In both subsidy programs, landlords must maintain their rentals at the Department of Housing and Urban Development's ("HUDs") Housing Quality Standards in order to rent to voucher and certificate holders.

Likewise, private landlords discriminate against recipients of TANF.⁹ The source of a prospective tenant's income can serve as a justification for refusal of tenancy by a private landlord. While this problem exists in public housing as well, approximately sixty-four percent of those receiving federal assistance live in private housing.¹⁰ This Note focuses on this realm of private housing and the struggle of tenants receiving vouchers or certificates from the Section 8 program or TANF to obtain adequate housing.

First, this Note discusses the existing protections against source of income discrimination and why they are inadequate without further interpretation or additional regulations. This Note explores the impact of the lack of protection against source of income discrimination on tenants and the policy reasons for why it is imperative that such protection exist. Inconsistent case decisions also indicate a need for such protection, as courts have little guidance on how to handle such a claim. Next, this Note explores solutions for improving source of income discrimination protection. This analysis includes an in-depth look at existing housing statutes and an examination of how protection is implicit in the legislative intent and purpose of such statutes. Other solutions discussed and evaluated include Congress amending the Fair Housing Act to include source of income as a protected category and HUD acting to promulgate regulations that ban source of income discrimination. This Note concludes by highlighting the seriousness of this problem, including the public's ignorance of it, and then calls for change.

I. WHY DISCRIMINATE AGAINST A TENANT'S SOURCE OF INCOME?

Society tends to stereotype its less powerful. The poor lack political power in this country, and with cut-backs to federal programs assisting the poor, many feel as if they are forgotten citizens.¹¹ People tend to forget that the poor are a deserving class, not second-class citizens, and harmfully label them as lazy

7. *See id.*

8. *Id.* § 1437f(o) (1994 & Supp. II 1996).

9. *See id.* § 601 (Supp. II 1996).

10. *See* COMMITTEE ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, GREEN BOOK, BACKGROUND MATERIAL AND DATA ON MAJOR PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS, at tbl. 7-23, AFDC Characteristics by Unit Type (U.S. Gov't Printing Office 1998) (visited Dec. 29, 1998) <<http://www.access.gpo.gov/congress/wm001.html>> [hereinafter GREEN BOOK].

11. *See* HOWARD J. KARGER & DAVID STOESZ, AMERICAN SOCIAL WELFARE POLICY 68-91 (1990).

criminals who have too many children. The truth, however, is that we all need to develop a genuine concern for the widening gap between the rich and poor. The top one-fifth of the U.S. population takes home more money than the lower four-fifths combined.¹² Class position shapes every aspect of one's life, and "statistics indicate that the class position of one's family is probably the single greatest determinant of future success, quite apart from intelligence and determination."¹³ We need to remember our country's future depends on our actions of social responsibility now. Children are twice as likely to live in poverty than adults, and minorities and women represent a disproportionate percentage of the poor.¹⁴ Unfortunately, "environmental racism" is society's reaction when someone lives on the "wrong side of the tracks."¹⁵

As upward social mobility becomes even less attainable for the poor, available affordable housing becomes imperative. "Affordable housing" is basically a boondoggle—a system whereby middle-class people award cheap housing to their friends and relations on the grounds that they are helping the poor."¹⁶ This country's idea of affordable housing is a bit misguided. With federal housing programs relying more on the private sector, we need to focus on private landlords in order to solve the problem of discrimination against a tenant's source of income.¹⁷ Today, we subject low-income families to moral judgments before their tenancy is accepted, especially in the private sector.¹⁸ "Discrimination against rental subsidy holders seems to be as open and blatant today as was racial discrimination in the years preceding the enactment of the Fair Housing Act."¹⁹ The effect of this blatant discrimination is that anywhere from twenty to forty percent of Section 8 recipients cannot find a place to use their certificate or voucher.²⁰ Case law also displays this blatant discrimination as the landlord involved usually admits that he or she has a policy of not

12. See Gregory Mantsios, *Rewards and Opportunities: The Politics and Economics of Class in the U.S.*, in PAULA S. ROTHENBERG, RACE, CLASS, AND GENDER IN THE UNITED STATES 96, 99 (2d ed. 1992).

13. ROTHENBERG, *supra* note 12, at 93-94.

14. See KARGER & STOESZ, *supra* note 11, at 92-111.

15. Dr. Robert D. Bullard, *The Legacy of American Apartheid and Environmental Racism*, 9 ST. JOHN'S J. LEGAL COMMENT. 445, 445 (1994) ("In the real world, some communities are located on the 'wrong side of the tracks' and, as a result, receive different treatment.").

16. WILLIAM TUCKER, *THE EXCLUDED AMERICANS* 189 (1990).

17. See *id.* ("The place where the hopes of the poor will live and die is in the private rental sector.").

18. See *id.*

19. Paula Beck, *Fighting Section 8 Discrimination: The Fair Housing Act's New Frontier*, 31 HARV. C.R.-C.L. L. REV. 155, 155 (1996).

20. See *id.* at 158 (citing NATIONAL COUNCIL OF STATE HOUSING AGENCIES, *THE LOW-INCOME HOUSING TAX CREDIT: THE FIRST DECADE* (1997); U.S. DEP'T OF HOUSING & URBAN DEV., HUD REINVENTION: FROM BLUEPRINT TO ACTION 28 (1995); John Weicher, *The Voucher/Production Debate*, in BUILDING FOUNDATIONS: HOUSING AND FEDERAL POLICY 263, 275 (1990)).

accepting Section 8 or TANF recipients as tenants.²¹ However, rather than focusing on this blatant discrimination, the courts focus on whether the fair housing law or statute actually applies.²²

Landlords have many reasons for discriminating against prospective tenants based on source of income. First of all, landlords stereotype tenants who receive Section 8 or TANF assistance. Landlords argue that Section 8 and TANF tenants bring noise and crime to their property. They claim that low-income families tend to damage the property more than others and that they have too many children.²³ One landlord said that he wanted "working" people and that he had other good tenants, so he wanted to keep his rentals nice.²⁴ This landlord also stated that "unemployed people would just be hanging around the house all day."²⁵ Frankly, these labels that landlords give to low-income families are naive and close-minded and cannot justify discrimination.

The most frequent reason that landlords give for why they discriminate on the basis of source of income deals with economic and business concerns. Section 8 regulations limit advance payment of any kind to \$50 or a tenant's one month payment, whichever is greater.²⁶ Because of these regulations, landlords fear that they cannot obtain the first and last month's rent of a standard lease. In one case, a landlord argued "that legitimate business reasons kept him from renting to Section 8 certificate holders, primarily [because of] his loss of the cash flow engendered from his collecting, in advance, the last month's rent and a security deposit equal to one month's rent."²⁷ Reliability undermines a landlord's cash flow concern. When a landlord enters a lease with a tenant that receives Section 8 assistance or even TANF, the tenant has a reliable and steady source of income to fund rent payments. One would think that a landlord would want a steady flow of cash rather than an unpredictable one in which tenants might default on their rent, especially if no formal lease agreement exists.

Along with the cash flow problem, landlords argue that the fair market rent rates set by regulations are too low to adequately maintain rental units.²⁸ However, Section 8 addresses this concern by providing that fair market rent rates are adjusted periodically to take into account increasing costs in a particular area.²⁹ Related to this problem, landlords also contend that the rent rates set by

21. See, e.g., *Salute v. Stratford Greens Garden Apts.*, 136 F.3d 293, 296 (2d Cir. 1998); *HUD v. Ross*, No. 01-92-0466-8, 1994 WL 326437, at *1-4 (H.U.D. July 7, 1994); *M.T. v. Kentwood Constr. Co.*, 651 A.2d 101, 102 (N.J. Super. Ct. App. Div. 1994).

22. See, e.g., *Salute*, 136 F.3d at 296; *Ross*, 1994 WL 326437, at *1-4; *Kentwood Constr. Co.*, 651 A.2d at 102.

23. See Florence Wagman Roisman, Lecture at the Indiana University School of Law—Indianapolis (Nov. 4, 1997) (notes on file with author).

24. See *Ross*, 1994 WL 326437, at *2-3.

25. *Id.* at *3.

26. 24 C.F.R. § 882.112(a) (1998).

27. *Attorney General v. Brown*, 511 N.E.2d 1103, 1109 (Mass. 1987).

28. See *Beck*, *supra* note 19, at 164.

29. See *id.* (citing 42 U.S.C. § 1437f(c)(1) (1994)).

regulation do not provide them with enough resources to keep their rental units maintained to HUD's Housing Quality Standards.³⁰ One has to question a landlord who would even rent out an apartment below these basic living standards. More generally, landlords complain about the red tape and inconvenience involved to accept Section 8 tenants.³¹ For example, one landlord said he does not accept Section 8 recipients "because (as he explains) he does not want to get involved with the federal government and its rules and regulations."³² This is a valid concern, and government agencies need to do away with this disincentive by limiting the red tape as much as possible. This administrative concern, however, in no way comes close to the weighing concern of providing affordable housing to needy families.

II. THE NEED FOR PROTECTION

A. Existing Protections

The Federal Fair Housing Act, also known as Title VIII of the Civil Right Act of 1968 ("Title VIII"),³³ provides the framework for action against housing discrimination. With the passage of Title VIII came bans on housing discrimination due to race, color, religion, or national origin.³⁴ In 1974, Congress added a ban on sex discrimination.³⁵ Also, in 1988 Congress expanded the Fair Housing Act to include such protected categories as familial status and handicap.³⁶ Title VIII provides some limited protection for people with low incomes. Some tenants have been successful in molding a discrimination case against a landlord into one of these protected classifications, even though the lurking problem may have been the tenant's source of income.³⁷

For example, in *Gilligan v. Jamco Development Corp.*,³⁸ the Ninth Circuit evaluated a family's claim that an apartment complex owner had a policy of refusing a tenant's application if the tenant received Aid to Families with Dependent Children ("AFDC").³⁹ The family claimed the landlord's refusal was intentional discrimination against the familial status provision of the Fair Housing Act.⁴⁰ The circuit court held that the family had a sufficient claim and

30. *See id.*

31. *See id.* at 165.

32. *Salute v. Stratford Greens Garden Apts.*, 136 F.3d 293, 296 (2d Cir. 1998).

33. 42 U.S.C. §§ 3601-3619, 3631 (1994 & Supp. II 1996).

34. *Id.* § 3604 (1994).

35. 42 U.S.C. § 3604 (1994).

36. Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified at 42 U.S.C. § 3604(d) (1994)).

37. *See Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246 (9th Cir. 1997); *Bronson v. Crestwood Lake Section 1 Holding Corp.*, 724 F. Supp. 148 (S.D.N.Y. 1989); *HUD v. Ross*, No. 01-92-0466-8, 1994 WL 326437 (H.U.D. July 7, 1994).

38. 108 F.3d 246 (9th Cir. 1997).

39. *Id.* at 248.

40. *Id.*

remanded the case for further proceedings.⁴¹

In another case, *Bronson v. Crestwood Lake Section 1 Holding Corp.*,⁴² a district court found discrimination against Section 8 recipients under the pretext of racial discrimination.⁴³ The district court in *Bronson* held that the defendant landlord's policies of refusing those who received Section 8 assistance or those whose income was not at least three times the rent charged resulted in an exclusion of African-Americans and Hispanics.⁴⁴ The defendant landlord claimed that "business necessities" forced it to have such policies, but the court rejected the defense due to apparent inconsistent treatment of minority applicants.⁴⁵

In an administrative decision, *HUD v. Ross*,⁴⁶ the agency ruled that a landlord violated the Fair Housing Act by discriminating against Hispanic and white women.⁴⁷ Several prospective tenants had inquired about renting an apartment. The landlord gave Hispanic women and other women extra hurdles to jump and additional conditions to meet.⁴⁸ The agency held that the landlord's "no welfare policy" had a disparate impact on women.⁴⁹

The courts in these three cases almost certainly knew that the landlord's problem with the tenants had more to do with their source of income than one of the protected categories. However, instead of addressing source of income discrimination, the courts disposed of each case by fitting the facts into a protected category like race, sex, national origin or familial status.

Tenants receiving Section 8 assistance or TANF also can find limited protection under the Equal Credit Opportunity Act ("ECOA").⁵⁰ The ECOA states that "[i]t shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . because all or part of the applicant's income derives from any public assistance program."⁵¹ This statute prohibits discrimination against credit applicants due to their source of income. Also, the Low-Income Housing Credit⁵² bans discrimination against participants in the Section 8 Voucher and Certificate Programs.

Finally, the protection best aimed to give support to Section 8 recipients was the "take one, take all" provision in the Housing and Community Development

41. *Id.* at 251.

42. 724 F. Supp. 148 (S.D.N.Y. 1989).

43. *Id.* at 156-57.

44. *Id.* at 160.

45. *Id.* at 158.

46. No. 01-92-0466-8, 1994 WL 326437 (H.U.D. July 7, 1994).

47. *Id.* at *7.

48. *Id.* at *6-8 (stating that the landlord either hung up when Hispanic women called or required that other women have \$950 in cash as a condition of their tenancy).

49. *Id.* at *7.

50. 15 U.S.C. § 1691 (1994 & Supp. II 1996).

51. *Id.* §1691(a)(2) (1994).

52. 26 U.S.C. § 42(h)(6)(B)(iv) (1994).

Act of 1987.⁵³ This provision kept private landlords, who had previously accepted Section 8 tenants, from discriminating against new tenant applicants because they received Section 8 assistance.⁵⁴ The “take one, take all” provision was not well-received among housing advocates because it discouraged private landlords from even beginning to accept applications from Section 8 tenants. Landlords would prefer not to participate than to be bound to the program. The provision was repealed by Congress in 1996.⁵⁵

Along with these limited federal protections, some state and local governments have supplemented such federal provisions by including source of income as a protected category in their state or local housing statutes.⁵⁶ For example, in Wisconsin the pertinent statute reads: “[A]ll persons shall have an equal opportunity for housing regardless of . . . lawful source of income.”⁵⁷ However, in the majority of these states parties have not litigated under these statutes so the meaning of source of income in them remains untested.

A few state cases have addressed statutes that include source of income as a protected category. For example, in *Knapp v. Eagle Property Management Corp.*,⁵⁸ the Seventh Circuit contemplated whether the Wisconsin Open Housing Act applied to a case involving a landlord’s refusal to rent to a prospective tenant because of her status as a recipient of federal rent assistance under the Section 8 Voucher Program.⁵⁹ The court held that Section 8 vouchers did not fit within the meaning of the Wisconsin statute, even though the statute specifically includes “lawful source of income.”⁶⁰ This outcome is indicative of the battle of definitions that occurs with these state statutes. The court in *Knapp* thought that Section 8 rent assistance vouchers were more like subsidies than income and also agreed with the district court’s use of a dictionary definition of “income.”⁶¹

53. Pub. L. No. 100-242, § 147, 101 Stat. 1852 (codified at 42 U.S.C. § 1437f(t)(1) (1994 & Supp. II 1996)), *repealed by* Pub. L. No. 104-134, § 203(a), 110 Stat. 1321-281 (1996).

54. The statute provided: “No owner who has entered into a contract for housing assistance payments under this section on behalf of any tenant in a multifamily housing project shall refuse—(A) . . . (B) to lease any available dwelling unit . . . to a holder of a voucher . . . and to enter into a voucher contract respecting such unit, a proximate cause of which is the status of such prospective tenant as holder of such voucher.” *Id.*

55. *See* Pub. L. No. 104-134, § 203(a), 110 Stat. 1321-281 (1996).

56. *See, e.g.*, CONN. GEN. STAT. ANN. § 46a-64c (West 1995 & Supp. 1998); D.C. CODE ANN. § 1-2515(a) (West 1981 & Supp. 1998); MASS. GEN. LAWS ANN. ch. 151B, § 4(10) (West 1996); MINN. STAT. ANN. § 363.03 (West 1991 & Supp. 1998); N.J. STAT. ANN. § 2A:42-100 (West 1987 & Supp. 1998); UTAH CODE ANN. § 57-21-2 (1994 & Supp. 1998); WIS. STAT. ANN. § 106.04 (West 1997).

57. WIS. STAT. ANN. § 106.04(1).

58. 54 F.3d 1272 (7th Cir. 1995).

59. *Id.* at 1276.

60. *Id.* at 1282.

61. *Id.* (noting that although Wisconsin statute had enlarged the meaning of “income” from a standard dictionary definition, the court agreed with the district court).

In *Attorney General v. Brown*,⁶² a defendant landlord asserted that the Massachusetts statute preventing landlords from discriminating against recipients of public assistance was preempted by the United States Housing Act of 1937 (the "Act"). The landlord argued that since this Act only requires voluntary participation, the state statute should be void under the Supremacy Clause.⁶³ The Supreme Judicial Court of Massachusetts held that the federal housing law did not preempt the state statute. The court stated that, "[i]t does not follow that, merely because Congress provided for voluntary participation, the States are precluded from mandating participation absent some valid nondiscriminatory reason for not participating."⁶⁴ The court explained that "[t]he Federal Statute merely creates the scheme and sets out the guidelines."⁶⁵ Even though the court in *Brown* held the Massachusetts statute valid, it also determined that issues of material fact existed as to whether the defendant landlord discriminated against the prospective tenants because of their subsidy holder status and therefore remanded the case back to the trial court.⁶⁶

*M.T. v. Kentwood Construction Co.*⁶⁷ in New Jersey provided a more favorable result for tenants receiving Section 8 subsidies. The superior court held that a landlord's refusal to accept Section 8 subsidies from an existing tenant violated 42 U.S.C. § 1437f(t), (the federal "take one, take all" provision), and the New Jersey Statute.⁶⁸ Since this case was decided, Congress repealed the "take one, take all" provision. However, the repeal does not mean that courts would decide *Kentwood* differently now, especially given the recent New Jersey appellate court decision in *Franklin Tower One, L.L.C. v. N.M.*⁶⁹ That court held that the New Jersey statute requires landlords to accept Section 8 payments and that mandating such a requirement is not preempted by federal law.⁷⁰

Based upon these cases, housing advocates believe that state statutes that include source of income protection clauses are not as effective as a federal provision could be due to inconsistent results.⁷¹ Because the case law previously discussed is diverse in its results and remedies, tenants cannot rely on a state statute to guide them if they face discrimination based upon their source of income. Even though states do have some significant protections against discrimination based upon a tenant's source of income, the federal government should deal with this problem uniformly. If the federal government took a stand against housing discrimination based upon a tenant's source of income, then federal courts would have more guidance in their decisions. A new prospective

62. 511 N.E.2d 1103 (Mass. 1987).

63. *Id.* at 1105.

64. *Id.* at 1106.

65. *Id.*

66. *Id.* at 1110.

67. 651 A.2d 101 (N.J. Super. Ct. App. Div. 1994).

68. *Id.* at 103.

69. 701 A.2d 739 (N.J. Super. Ct. App. Div. 1997).

70. *Id.* at 742.

71. See Beck, *supra* note 19, at 170.

would also affect the states, because they would find support to enact their own legislation to protect against source of income discrimination.

B. Why Existing Protections Are Inadequate

The existing protections against source of income discrimination do not provide adequate protection for recipients of Section 8 assistance and TANF. The Fair Housing Act does not include source of income as a protected category.⁷² Therefore, any protections provided by it are indirect. If low-income families want to protect themselves from source of income discrimination, they have to mold and shape their cases into discrimination cases based upon an existing protected classification like race, sex, or national origin.⁷³ With this type of molding, the only relief available does not fit the actual harm. Also, if persons cannot fit within a protected class, like white males without a disability, then they have no remedy available. Further, the limited protections under the Equal Credit Opportunity Act⁷⁴ and the Low-Income House Credit⁷⁵ apply only to specific situations and are not broad enough to deal with the private rental housing sector. The “take one, take all” provision of Section 8 may have helped to at least contain the problem of discrimination, even though much criticism arose because of the disincentive it created for landlords to start participating in the program.⁷⁶ However, with the repeal of the provision, any hopes that private landlords will continue to participate in Section 8 programs are uncertain.⁷⁷

Therefore, recipients of Section 8 assistance and TANF will only find protection if their particular state or local government bans housing discrimination against them. The majority of states do not have any sort of protection against source of income discrimination. Those states that do have such protection⁷⁸ cannot provide complete reassurance for tenants. For example, if the statute does not specifically define what qualifies as “source of income,”⁷⁹ much controversy and litigation can result over the term’s meaning.⁸⁰ Also,

72. 42 U.S.C. §§ 3601-3619, 3631 (1994 & Supp. II 1996).

73. See, e.g., *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246 (9th Cir. 1997); *Bronson v. Crestwood Lake Section 1 Holding Corp.*, 724 F. Supp. 148 (S.D.N.Y. 1989); *HUD v. Ross*, No. 01-92-0466-8, 1994 WL 326437 (H.U.D. July 7, 1994).

74. 15 U.S.C. § 1691(a)(2) (1994).

75. 26 U.S.C. § 42(h)(6)(B)(iv) (1994).

76. 42 U.S.C. § 1437f(t)(1) (1994).

77. The “take one, take all” provision was repealed by Pub. L. No. 104-134 § 203(b), 110 Stat. 1321-281 (1996).

78. See, e.g., CONN. GEN. STAT. ANN. § 46a-64c (West 1995 & Supp. 1998); D.C. CODE ANN. § 1-2515(a) (West 1981 & Supp. 1998); MASS. GEN. LAWS ANN. ch. 151B, § 4(10) (West 1996); MINN. STAT. ANN. § 363.03 (West 1991 & Supp. 1998); N.J. STAT. ANN. § 2A:42-100 (West 1987 & Supp. 1998); UTAH CODE ANN. § 57-21-2 (1994 & Supp. 1998); WIS. STAT. ANN. § 106.04 (West 1997).

79. See, e.g., WIS. STAT. ANN. § 106.04.

80. See, e.g., *Knapp v. Eagle Property Management Corp.*, 54 F.3d 1272, 1282 (7th Cir.

courts often have to deal with preemption of the state law by federal law.⁸¹ With all of these issues thrown into the courtroom, the various courts have dealt with source of income discrimination in housing very differently.⁸² In the few instances when courts have decided cases based upon discrimination caused by a tenant's source of income, they have produced more confusion than clarification of the scope or the application of the state statute. It is therefore difficult for a tenant to rely on state provisions for protection of her right to housing. Inconsistency and confusion about source of income discrimination in state courts suggests that the federal government needs to address the issue. States alone cannot provide the ultimate solution to this injustice.

The injustices caused by allowing private landlords to discriminate against their tenants based upon the tenants' source of income are clear. Landlords do not even try to hide the reasons why they discriminate against tenants whose income comes from Section 8 or TANF programs because the law does not protect against it like it does race or sex.⁸³ Landlords have no fear that outright discrimination will ever come back to haunt them. Landlords sometimes even use a tenant's source of income as a defense to a claim of housing discrimination. "Indeed, the defense in many federal fair housing cases has been that the plaintiff was rejected not because of his race or other prohibited reason but because he could not afford the payments required for the defendant's housing."⁸⁴ Housing advocates and practitioners are frustrated by these injustices as well. One particular advocate related a complaint recently lodged by a woman with a disability.⁸⁵ The landlord had already failed to renew the leases of other Section 8 tenants in her private apartment complex or had evicted them. The complainant is the only Section 8 recipient left. The landlord threatened eviction, and the complainant filed a discrimination claim based upon her disability. This apartment complex landlord likely was more concerned with the complainant's source of income than her disability, but the poor are forced to battle discrimination based only upon protected categories.⁸⁶

The administrative process for filing a housing discrimination claim is burdensome. One Housing Authority explained that the complaint must be in

1995).

81. See, e.g., *Attorney General v. Brown*, 511 N.E.2d 1103, 1105-1107 (Mass. 1987) (holding that Section 8 did not preempt Massachusetts statute prohibiting discrimination against recipients of public assistance and rent subsidy holders); *Franklin Tower One v. N.M.*, 701 A.2d 739, 742 (N.J. Super. Ct. App. Div. 1997) (holding that Section 8 did not preempt New Jersey statute prohibiting landlords from refusing to rent to an individual with a lawful source of income).

82. See generally *Knapp*, 54 F.3d at 1272; *Brown*, 511 N.E.2d at 1103; *Franklin Tower One*, 701 A.2d at 739; *M.T. v. Kentwood Constr. Co.*, 651 A.2d 101 (N.J. Super. Ct. App. Div. 1994).

83. See 42 U.S.C. §§ 3601-19, 3631 (1994 & Supp. II 1996).

84. ROBERT G. SCHWEMM, *HOUSING DISCRIMINATION LAW* 380 (1983).

85. Telephone Interview with Sandy Jensen, Attorney and PACE Real Estate Supervisor, Indiana Civil Rights Commission (Dec. 29, 1997).

86. See *id.*; see also *supra* notes 73-77 and accompanying text.

writing, and it must be tailored to a particular form.⁸⁷ The government form is long and complicated. Many victims of housing discrimination do not take the time and energy to fill out the form when they believe their chances of ever proving a claim are slim.⁸⁸ The resources required to file a private lawsuit against a landlord might also serve as a disincentive for victims.

Another problem related to the lack of protection against source of income discrimination is the lack of funding and technology for record-keeping. States that do not ban discrimination based upon source of income do not have the funding to keep computerized statistics on the number of reported complaints.⁸⁹ The only way to find a person's source of income in a housing discrimination complaint is to go back through records manually. Even then, the investigator usually does not ask about a tenant's source of income because the focus must be on protected civil rights.⁹⁰ Also, local housing authorities keep most statistics on the number of people that cannot find a place to use their certificate or voucher, making it difficult to find a consistent and reliable broad-based number that reflects the problem. This situation is troubling because without record-keeping in states coupled with the lack of source of income discrimination protection, legislators have little indication other than anecdotal evidence about the seriousness of this problem.⁹¹

The empirical evidence that does exist about housing discrimination based upon source of income is even more disturbing. According to the Department of Housing and Urban Development, eighty percent of families receiving Section 8 assistance successfully find a place to use their Section 8 vouchers and certificates.⁹² That leaves twenty percent without a place to use their voucher or certificate.⁹³ Other studies find the success number lower, more likely between sixty and sixty-five percent.⁹⁴ This success rate drops for minority families and

87. Telephone Interview with Charlene Anderson, Project Administrator, Indiana Department of Family and Social Services, Housing and Community Services Division (Jan. 2, 1998).

88. *See id.* (explaining that a Form 903 is difficult to complete, and many people do not take the time to fill it out because they believe their chances of ever proving a claim of housing discrimination are slight).

89. *See* Telephone Interview with Sandy Jensen, *supra* note 85.

90. *See id.* (explaining that a location or field does not even exist to enter information about a tenant's source of income into the computer).

91. Telephone Interview with Mark St. John, Executive Director, Indiana Coalition on Housing and Homeless Issues, Inc. (Dec. 29, 1997) (noting that there is no legislation in Indiana in the area of landlord/tenant law).

92. U.S. DEP'T OF HOUSING AND URB. DEV., HUD REINVENTION: FROM BLUEPRINT TO ACTION 28 (Mar. 1995).

93. *See id.*

94. *See* Beck, *supra* note 19, at 158 n.18 (citing NATIONAL COUNCIL OF STATE HOUSING AGENCIES, THE LOW-INCOME HOUSING TAX CREDIT: THE FIRST DECADE 72 (May 1997) (finding that "one recipient in six fails to find acceptable housing even when aided by a Section 8 voucher."); Weicher, *supra* note 20, at 275).

large families. Also, sixty-four percent of families receiving TANF live in private rental housing.⁹⁵ Combined, these statistics emphasize the need for affordable housing. Also, “[r]egardless of their eventual success or failure in finding housing, most recipients experience discrimination from at least one landlord because of their Section 8 status.”⁹⁶ Furthermore, governmental checks on private landlords are not as easy to administer as checks on government-owned housing. These statistics prove that the current federal law, including the Fair Housing Act and the Housing and Community Development Act of 1974, are not accomplishing the goals to provide affordable and fair housing with choice.

Federal housing law also is not accomplishing the goal of desegregation by race and class. When the Fair Housing Act was first passed, “[i]t [was] the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”⁹⁷ However, since the passage of the Fair Housing Act, poverty is still very much concentrated and low-income families are often grouped together into neighborhoods.⁹⁸ Furthermore, in the United States, housing is still segregated by class and race.⁹⁹ A major goal of the Section 8 programs was to provide more mobility to low-income families. Section 8 certificates and vouchers were supposed to give tenants some choice in their housing; that is, to get their families into safe neighborhoods where their children could play. However, without a federal ban on source of income discrimination in housing, low-income families have no meaningful choice in private rental housing. One housing advocate explains how the existing federal law is not enough to provide any meaningful choice for low-income families:

Providing the subsidy is a necessary but not a sufficient condition of deconcentrating poverty. To deconcentrate poverty, it is necessary both to provide the subsidy and to assure that the subsidy can and will be used in a neighborhood in which poverty is not concentrated. To the extent that one seeks to address both racial separation and poverty concentration, the provision of the subsidy must be linked to some desegregative or at least anti-discriminatory program.¹⁰⁰

Low-income families must go where a landlord will accept their tenancy. Unfortunately, the location of the rental units in which landlords do accept Section 8 are often in impoverished or deteriorating neighborhoods.¹⁰¹ Landlords

95. See GREEN BOOK, *supra* note 10, at tbl. 7-23.

96. Beck, *supra* note 19, at 161-62.

97. 42 U.S.C. § 3601 (1994).

98. See Beck, *supra* note 19, at 156.

99. See *id.*

100. See Florence Wagman Roisman, *The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Racial Integration*, 81 IOWA L. REV. 479, 517 (1995).

101. See *Bronson v. Crestwood Lake Sectional Holding Corp.*, 724 F. Supp. 148, 153 (S.D.N.Y. 1989). This case displays the lack of meaningful choice: Plaintiffs argued that if the court did not grant injunctive relief, they would continually be exposed to the harm of their present

often decide where to place tenants geographically based upon whether they receive Section 8 or TANF. This strategic placement of tenants segregates housing by class. Allowing landlords to refuse Section 8 and TANF tenants arbitrarily only further traps people in a life of poverty. How can society expect growth and opportunity when it just pounds down the hopes any low-income families have to find a way out of deteriorating neighborhoods?

III. SOLUTIONS

The problem of housing discrimination based upon source of income is a serious and complicated one. The discrimination that occurs is blatant and leaves many people without any meaningful choice for adequate housing. Any solution proposed could not completely rid this world of housing discrimination based upon a person's source of income. However, by exploring some different alternatives to combat discrimination against Section 8 and TANF recipients, we can better learn how to deal practically with this problem. Taking steps toward curing this wrong can truly save many families' and their children's dim futures.

A. Amending the Fair Housing Act—The Beck Model

The first proposed solution to the source of income discrimination problem is calling for an amendment to current federal law. This alternative would involve an amendment to the Fair Housing Act which currently states that, "it shall be unlawful [t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."¹⁰² An amendment to the Fair Housing Act would add source of income as a protected category, and the definition of "source of income" would include recipients of public assistance including Section 8 and TANF. Paula Beck, in her article, *Fighting Section 8 Discrimination: The Fair Housing Act's New Frontier*, proposes that Congress amend the Fair Housing Act to prohibit landlords from discriminating against prospective tenants due to their status as rental subsidy holders.¹⁰³ Beck asserts that there is some precedent supporting this type of amendment including the Housing Act of 1937 and the Equal Credit Opportunity Act of 1974.¹⁰⁴

Beck begins her argument for an amendment to the Fair Housing Act by explaining that courts disfavor the use of race, sex, or another protected category in a discrimination case involving source of income.¹⁰⁵ An amendment to the Fair Housing Act would alleviate any need to fit a claim into another protected

neighborhood, including a "high crime rate, active drug trade and unsafe conditions." *Id.*

102. 42 U.S.C. § 3604(a) (1994).

103. Beck, *supra* note 19, at 160. Paula Beck is an advocate of amending the federal housing law with respect to at least those receiving Section 8 assistance.

104. *Id.* at 160-61.

105. *Id.* at 169-71 (citing *Knapp v. Eagle Property Management Corp.*, 54 F.3d 1272, 1280 (7th Cir. 1995)).

category.¹⁰⁶ The exact language she proposes to add is: "Status with regard to rental assistance"¹⁰⁷ and the phrase would be defined: "The condition of being a tenant receiving federal, state, or local rental subsidies."¹⁰⁸ After defining the actual terms of the proposed amendment, Beck engages in an economic analysis of it. Even though she states that landlords have no rational economic basis for discriminating against Section 8 tenants, she assumes, for a hypothetical model, that Section 8 tenants actually do pose a higher cost upon landlords.¹⁰⁹ Some possible sources of increased costs include "administrative fees, property damage, or elevated repair costs."¹¹⁰ Beck notes that an amendment to the federal housing law would shift the burden to housing providers in the private market.¹¹¹ So, instead of Section 8 recipients bearing all extra costs, if extra costs in fact do exist, both landlords and tenants would share them.¹¹² After this cost-shifting framework is introduced, Beck then provides a "neighborhood model" to explain by example the economic theory behind the proposed amendment.¹¹³ What follows is an analysis of a community with two income levels and two levels of apartments, and the way in which the market will eventually take care of the cost-shifting problem.¹¹⁴

Although Beck labels this model as "highly stylized and unrealistic," she claims that is helpful because it demonstrates who would bear the burden of discrimination.¹¹⁵ Without protection against discrimination, Beck concludes, "former public housing residents will be concentrated in low-income neighborhoods, displacing many of the unsubsidized, low-income tenants already residing there, [and] Section 8 tenants will be denied the freedom of choice in housing."¹¹⁶ Beck then states that an amendment prohibiting discrimination against rental subsidy holders will open up middle-class neighborhoods to subsidized tenants and spread the cost of housing from low-income families to middle-class renters and landlords.¹¹⁷

106. See Beck, *supra* note 19, at 171.

107. *Id.*

108. *Id.*

109. *Id.* at 171.

110. *Id.*

111. *Id.*

112. See *id.*

113. *Id.* at 172.

114. *Id.* at 172-75. Beck's model includes "two categories of rental units within [one] neighborhood." *Id.* at 172. One level has a lower level of amenities and a lower rent rate. *Id.* Beck asserts that landlords may not want to rent the units with a higher level of amenities to Section 8 tenants because of alleged higher costs. *Id.* Landlords would prefer to save these units for middle-income tenants. See *id.* at 172-73. If Section 8 tenants want the higher level of units, they would have to outbid middle-income tenants. Section 8 tenants would end up paying more than thirty percent of their income. See *id.*

115. *Id.* at 181.

116. *Id.*

117. *Id.*

However, society does not accept this sort of cost-shifting. Beck acknowledges her critics who suggest that the public as a whole should bear the burden, not just middle-class renters and landlords.¹¹⁸ For example, U.S. Supreme Court Justice Scalia criticized that a “welfare transfer should not be treated like mere economic regulation because doing so disproportionately burdens certain groups instead of properly spreading the burden across society at large.”¹¹⁹ Beck points out that society already redistributes wealth and shifts the burden to certain segments.¹²⁰ Examples of such cost-shifting include minimum wage, rent control ordinances, laws limiting monopolies, worker safety laws and product liability laws.¹²¹ Beck also supports her proposition to amend fair housing law by pointing to the ways in which poverty law has increased the duties of land owners and how the recent trend makes owners consider the effects of their uses of their property.¹²²

Finally, the Beck model poses the question of whether the amendment will really work in practice. In this section, Beck points out that the Fair Housing Act was highly ineffective before the 1988 amendment because of the lack of enforcement and monitoring.¹²³ The 1988 amendment did make it more affordable for plaintiffs to bring complaints and it improved enforcement measures.¹²⁴ However, it is still quite costly to file a private lawsuit, and the costs often deter victims of source of income discrimination.¹²⁵ Likewise, an amendment to include subsidy holders will have similar enforcement problems.¹²⁶ There will also be problems of proof with invoking the new law and proving a landlord’s discriminatory assertions, which will no doubt become more subtle after the passage of such an amendment.¹²⁷ Even with all of these problems, Beck still asserts that an amendment would effectively shift the burden to those who can most afford it.¹²⁸

Beck’s proposed solution would help alleviate the burden currently thrust upon subsidized tenants. The debate about where to redistribute the burden will continue. However, examples of how society already redistributes burdens to certain members of society¹²⁹ included in Beck’s article help illustrate the

118. *Id.* at 182-83.

119. *Id.* at 182 (quoting *Pennell v. City of San Jose*, 485 U.S. 1, 22 (1988) (Scalia, J., concurring in part and dissenting in part)).

120. *Id.* at 182.

121. *See id.* Minimum wage laws, product and workplace safety provisions, and laws limiting the formation of monopolies shift the burden to employers and manufacturers. Rent control ordinances shift the burden to landlords. *See id.*

122. *Id.* at 182-83.

123. *Id.* at 183-84.

124. *See id.* at 184.

125. *See id.*

126. *See id.*

127. *See id.* at 185.

128. *Id.*

129. *See id.* at 182 (minimum wage, monopoly control, rent control, safety in products, safety

fairness of allocating the burden of renting to subsidized tenants to the middle-class and landlords. This argument correctly suggests that society needs to have more community responsibility woven into its fabric. We should not view this “cost-shifting” as a burden but as a duty because middle-class renters and landlords can better bear extra costs than low-income tenants. Also, if we compare competing interests of landlords and middle-income renters paying slightly higher costs for rentals and expenses across the board with the necessity for low-income renters to have adequate housing, the need for housing for all people should tip the scale.

However, in practice, an amendment to the Fair Housing Act to include “status with regard to rental assistance”¹³⁰ would be seriously flawed. First, the language of the amendment would leave out other sources of income that may also provide a basis for discrimination. Most importantly, those families who receive TANF would not find protection from such an amendment because not all recipients of TANF are also subsidy holders.¹³¹ Beck displays in her economic analysis that even under the new amendment, low-income families that do not receive rental assistance could be displaced by subsidized tenants due to increasing rent costs.¹³² Beck’s economic analysis in support of an amendment breaks down here because low-income tenants that are not subsidized will also bear the burden along with middle-income renters and landlords.

Second, people do not act in conformity with the workings of an economic model. Beck admits the model is unrealistic,¹³³ as all models are to some extent. Beck’s model illustrating who bears the burden seems like a mathematical equation with an appropriate solution. However, humans cannot always be subject to the mathematical calculations of economic analysis, as if there are no other aspects like morality and justice that motivate people’s actions. Cost-benefit analysis is not the best way to find a solution to the crisis of low-income families’ need for housing, but it is a definite beginning. Beck’s model is based upon the assumption that Section 8 tenants pose a higher cost to landlords than non-subsidized tenants. If landlords claim they are experiencing higher costs when renting to Section 8 tenants, then it is probably because their rentals are not in adequate shape for renting. The housing quality standards set by HUD regulations are not above and beyond maintaining a rental unit to decent living conditions.¹³⁴ Landlords who insist that Federal Housing Quality Standards are too stringent could even be violating the implied warranty of habitability wherein the landlord promises to deliver and maintain the premises in habitable

in the workplace).

130. *Id.* at 171.

131. GREEN BOOK, *supra* note 10, at tbls. 15-1 to 15-3. In 1995, only 31.1% of AFDC recipients also received assistance from public or subsidized rental housing. *Id.*

132. *Id.* at 180. *See also supra* note 114 and accompanying text.

133. *Id.* at 181.

134. *See* Telephone Interview with Mark St. John, *supra* note 91 (stating that standards set by HUD are reasonable and only deal with the necessities of livable housing).

conditions in the interest of the safety and health of the tenant.¹³⁵

Finally, an amendment to the Fair Housing Act to include protection for rental subsidy holders is not likely to occur in the near future. Legislators likely would not pass such a measure, as our country's politics are moderate to conservative right now. With recent trends in legislation, such as passage of the welfare reform bill, the poor in our country are receiving less assistance from the federal government than ever before.¹³⁶ If anything, legislation shows a trend away from passing an amendment to the Fair Housing Act to protect low-income families.¹³⁷ Also, the federal government would hesitate to include source of income as a protected category because in the realm of public housing, a court evaluating claims of discrimination may need to raise its level of scrutiny when reviewing the states' action when it undertakes a Fourteenth Amendment equal protection analysis.¹³⁸

B. Taking Existing Law and Finding Protection

An alternative solution to this problem of source of income discrimination is much less complicated than amending the Fair Housing Act. This solution involves analyzing the language of existing statutes. The purposes of existing federal housing law imply a prohibition against discrimination based upon a prospective tenant's source of income. Without any prohibition against this type of discrimination, the purpose of existing law would be frustrated. The following analysis looks specifically at the Section 8 statute¹³⁹ as well as the Personal Responsibility and Work Opportunity Act of 1996.¹⁴⁰

To begin this analysis, a close reading of the pertinent statutes is necessary. Section 8 declares as its official policy:

It is the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this chapter, to assist the several States and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of lower income and, consistent with the objectives of this chapter, to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs.¹⁴¹

Another stated purpose of the Section 8 programs is "to provide a decent home

135. See JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 519-52 (5th ed. 1998).

136. See 42 U.S.C. § 601 (Supp. II 1996).

137. See, e.g., 42 U.S.C. § 1437f(t), *repealed by* Pub. L. No. 104-134, §§ 203(b), (c), 110 Stat. 1321-281 (1996).

138. See generally JEROME A. BARRON ET AL., CONSTITUTIONAL LAW: PRINCIPLES AND POLICY 559-60 (5th ed. 1996).

139. 42 U.S.C. §§ 1437 to 1437aaa-8 (1994 & Supp. I 1995 & Supp. II 1996).

140. *Id.* § 601 (Supp. II 1996).

141. *Id.* § 1437 (1994).

and a suitable living environment for every American family that lacks the financial means of providing such a home without government aid.¹⁴² Other goals of Section 8 are to promote mobility and desegregation along class and racial lines.¹⁴³

With these specific purposes in mind, it is unlikely that legislators would allow discrimination against a tenant's source of income if they truly wanted to accomplish the stated goals. It is difficult to speculate exactly what the legislature's intent was at the time the statute was passed. However, one cannot ignore the language of the statute which states that the goal of Section 8 is to provide safe and adequate housing for low-income families. If the purpose of the statute was to provide affordable housing and mobility to low-income families, then this purpose would be frustrated by allowing landlords to discriminate against prospective tenants because of their source of income. The promise of Section 8 is empty without giving the poor a chance to move out of deteriorating neighborhoods and find a safer place for their families to live.

Of course, there is the question of whether the legislators actually contemplated that federal law should allow source of income discrimination, as legislative history is silent on this issue.¹⁴⁴ However, a general theme of the statute discourages housing discrimination. Also, legislators might have assumed that HUD's regulations already protected source of income discrimination. Most people would assume that such an injustice is protected. Section 8 seems pointless if low-income families cannot find a place in which to use their voucher or certificate and can never move out of a less than desirable neighborhood. Legislators might well have believed their actions and words through this statute represent a ban on source of income discrimination in housing because the goals of the statute are impossible without such a ban.

TANF also has a specific stated purpose:

The purpose of this part is to increase the flexibility of States in operating a program designed to—1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives; 2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage; 3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and 4) encourage the formation and maintenance of two-parent families.¹⁴⁵

142. *Thorpe v. Housing Authority*, 393 U.S. 268, 281 (1969) (citation omitted).

143. *See* 42 U.S.C. § 1437(a) (1994); *see also* Beck, *supra* note 19; Roisman, *supra* note 100.

144. *See generally* S. REP. NO. 101-316 (1990), H.R. CONF. REP. NO. 101-943 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5763; H.R. REP. NO. 100-604 (1988), *reprinted in* 1988 U.S.C.C.A.N. 791; S. REP. NO. 97-139 (1981), H.R. CONF. REP. NO. 97-208 (1981), *reprinted in* 1981 U.S.C.C.A.N. 396; S. REP. NO. 93-693 (1974), H.R. CONF. REP. NO. 93-1279 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4273.

145. 42 U.S.C. § 601 (Supp. II 1996).

The passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA")¹⁴⁶ marked a drastic change in society and ended welfare as we knew it. This welfare reform bill had very specifically stated purposes reflected in its slogan: "Moving people from welfare to work."¹⁴⁷ If the goal of this act that created the new TANF program really is to promote responsibility and less dependence of the government, then it is difficult to see how low-income families could accomplish such a goal without the ability to meaningfully choose their housing.

If one examines the language of the stated purpose of PRWORA, legislators clearly wanted strong traditional families.¹⁴⁸ However, the absence of an explicit provision protecting low-income families from housing discrimination indicates that legislators did not enable families with the tools to escape the trappings of poverty. Families who have an extremely burdensome struggle to find affordable and decent housing cannot always fit the mold of a "traditional two-parent family"¹⁴⁹ given all of the stress involved in just trying to put a roof over their children's heads. For these reasons, a prohibition against source of income discrimination must be implied in the act. Without such an implied ban, the goal of the statute is nearly impossible to reach.

The foundation definitely exists in Section 8 and TANF statutes for a court faced with a housing discrimination claim to look at the legislative intent at the time of passage and conclude that in order to fulfill accurately the purposes of the statute, a prohibition against source of income discrimination must be implied. This alternative solution definitely would not require society to move as many mountains it would take to amend the Fair Housing Act. However, courts may not want to build boldly on this foundation by ruling that the prohibition against source of income discrimination is implied in the statutes. Some members of the judiciary have taken steps to consider this approach.¹⁵⁰ However, there is a danger in this strategy because if the judiciary took such action, the public could view the court as making law. Arguably, making law on such a political issue might best be left to the other branches of government. Debate might ensue over the role of judicial activism and how we as a society do not want judges making law to suit their own policies and morals. The dangers of judicial power is a heated topic that will always spark debate, regardless of how one feels about the outcome of a particular decision. Regardless of this debate, if a court carefully laid out its opinion explaining step-by-step how a prohibition against housing discrimination based upon a tenant's source of income is implied in current federal law, the decision might stand over criticisms and appeals.

146. Pub. L. No. 104-193, §§ 101-913, 110 Stat. 2105 to 2355 (codified as amended at scattered sections of 42 U.S.C. (Supp. II 1996)).

147. Statement by President William J. Clinton, 1997 U.S.C.C.A.N. 176.

148. 42 U.S.C. § 601 (Supp. II 1996).

149. *Id.*

150. See *Salute v. Stratford Greens Garden Apts.*, 136 F.3d 293, 302-03 (2d Cir. 1998) (Calabresi, J., dissenting).

C. *HUD Promulgating Regulations*—*NAACP v. American Family*

The last alternative to solving the problem of source of income discrimination is the most practical and realistic. This solution calls for HUD to promulgate regulations prohibiting source of income discrimination. If the Secretary of HUD would interpret existing federal housing law to include source of income as a protected category and enact regulations consistent with this interpretation, then it is likely that courts would respect the Secretary's decision and authority. Further, HUD's promulgation of regulations would be the most efficient and least controversial solution to low-income families' need to find affordable housing free of discrimination. This statement may seem hasty, as one would think that courts and the power of judicial review would not respect an administrative decision made by the executive branch. However, precedent indicates the contrary.

The Seventh Circuit, in *NAACP v. American Family Mutual Insurance Co.*,¹⁵¹ determined whether "redlining in the insurance business [amounted to] racial discrimination, violating the Fair Housing Act. 'Redlining' is charging higher rates or declining to write insurance for people who live in particular areas (figuratively, sometimes literally, enclosed with red lines on a map)."¹⁵² When a potential home buyer seeks to take out a mortgage, lenders will not provide credit unless the buyer can secure insurance to serve as collateral for the loan.¹⁵³ As the majority of potential home buyers require a mortgage in order to have the funds to purchase a home, the need for insurance is clear. The practice of redlining often pushes potential buyers out of the market.¹⁵⁴ "If insurers redline areas with large or growing numbers of minority residents, that practice raises the cost of housing for black persons and also frustrates their ability to live in integrated neighborhoods."¹⁵⁵

After the court explained how the insurance industry deals with pools and risks, it concluded that "risk discrimination is not race discrimination."¹⁵⁶ The court noted that while this distinction exists, it is difficult to differentiate when risks are just risks or when risks are generated by discrimination.¹⁵⁷ The court then debated whether the Fair Housing Act applies to the insurance industry,¹⁵⁸ concluded that it does apply, and allowed the plaintiffs alleging discrimination to keep their claims under the Fair Housing Act.¹⁵⁹

In the midst of this debate, the court pointed to the fact that Congress enacted

151. 978 F.2d 287 (7th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993).

152. *Id.* at 290.

153. *See id.*

154. *See id.*

155. *Id.*

156. *Id.*

157. *Id.* at 290-91.

158. *Id.* at 293-302.

159. *Id.* at 301-02.

amendments to the Fair Housing Act in 1988 “authorizing [HUD] to make rules . . . to carry out this subchapter.”¹⁶⁰ The court explained that “Congress gave the Executive Branch,” namely HUD, this rule-making power.¹⁶¹ Also, Congress gave HUD “this power with knowledge that since 1978 a succession of Secretaries have believed that ‘[i]nsurance redlining, by denying or impeding coverage[,] makes mortgage money unavailable, rendering dwellings “unavailable” as effectively as the denial of financial assistance on other grounds.’”¹⁶² Given this background, the court found that the Secretary of HUD used the rule-making power given by Congress to issue regulations stating that refusing to provide insurance because of race was included in the prohibitions of 42 U.S.C. § 3604.¹⁶³

The Seventh Circuit then concluded that the Secretary of HUD’s construction of the text of 42 U.S.C. § 3604 was plausible.¹⁶⁴ More importantly, the court applied the rule that if the construction is plausible, then it should be respected.¹⁶⁵ “Courts should respect a plausible construction by an agency to which Congress has delegated the power to make substantive rules.”¹⁶⁶ The court acknowledged the predictable criticism that courts should not defer to administrative decisions when judges hold the power of enforcement,¹⁶⁷ but the court addressed the issue by pointing to the 1988 amendments of the Fair Housing Act in which a provision for administrative enforcement was created “paralleling judicial enforcement.”¹⁶⁸ Because the Fair Housing Act sets up administrative enforcement, and the Secretary’s regulations would receive deference in an administrative decision, plaintiffs would face different substantive law if their litigation began in the administrative courts than if it began in a district court.¹⁶⁹ To say that the Fair Housing Act applies to the insurance industry in administrative decisions but not in a district court does not make any sense and inconsistency would result.

The court also pointed to other precedent that suggested that even without Congress’ grant to HUD the power to make substantive rules, the Secretary’s regulations should be given deference by the court. Before the 1988 amendments were passed, “the Supreme Court declared that the Secretary’s views about the

160. *Id.* at 300 (quoting 42 U.S.C. § 3614a (1994)).

161. *Id.*

162. *Id.* (quoting Memorandum by the General Counsel of HUD, *quoted in* Dunn v. Midwestern Indem. Mid-Am. Fire & Cas. Co., 472 F. Supp. 1106, 1109 (S.D. Ohio 1979)).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* (citing *Pauley v. Bethernenergy Mines, Inc.*, 501 U.S. 680, 706 (1991); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, *reh’g denied*, 468 U.S. 1227 (1984)).

167. *Id.*

168. *Id.* (citing 42 U.S.C. §§ 3610-12 (1994)).

169. *See id.*

meaning of [the Fair Housing Act] are entitled to 'great weight.'"¹⁷⁰ The Seventh Circuit ended its analysis on the issue of whether administrative regulations should have deference in the interpretation of the Fair Housing Act by concluding that if "the Secretary's regulations are tenable," then the courts should respect them.¹⁷¹

The decision in *NAACP v. American Family Mutual Insurance Co.* opens the door for HUD to promulgate regulations interpreting federal housing law. The Secretary of HUD can openly express his views of the law, and as long his constructions are plausible, they will be respected. When we look at the legislative intent of Section 8 and TANF, we find an implied prohibition on source of income discrimination.¹⁷² Therefore, the Secretary of HUD could interpret these statutes to include a prohibition against "source of income" discrimination in housing in the form of regulations. Such an interpretation is not implausible because the existing statute from which the Secretary draws his construction need not explicitly mention "source of income," just as the insurance industry was not mentioned in the Fair Housing Act in *American Family Mutual Insurance Co.*¹⁷³ Further, the Secretary's views are always given great weight, so with careful wording and explanation of why the goals of Section 8 and TANF could not be fulfilled without a ban on "source of income" discrimination, the courts would likely respect the regulations.

This solution would be the least controversial one of the three proposed solutions in this Note. Armed with an explicit HUD regulation including source of income discrimination as a protected category, victims of source of income discrimination would no longer have to manipulate their claim into a protected category of the Fair Housing Act or rely upon the inconsistencies of state and local fair housing law to get relief. Arguably, the Seventh Circuit in *American Family Mutual Insurance Co.* addressed an issue dealing with race, and the court may not have been as receptive if the issue dealt with "source of income." However, that court noted that the 1988 amendments to the Fair Housing Act gave HUD rule-making power and did not differentiate with respect to different issues.¹⁷⁴ The issue before the court, while implicating race, dealt with the insurance industry which does not explicitly appear in the Fair Housing Act either.

Action by the Secretary of HUD would not take an act of Congress, as Congress already granted HUD the power to make substantive rules and provide enforcement.¹⁷⁵ While it is true that enacting administrative regulation is not a quick process, it is more timely than Congress debating the issue and agreeing to terms of an act that the President will sign. Also, a court would not have to find

170. *Id.* at 300-01 (quoting *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 107 (1979); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972)).

171. *Id.* at 301.

172. *See* 42 U.S.C. § 1437 (1994); 42 U.S.C. § 601 (Supp. II 1996); *see also infra* Part II.B.

173. *NAACP v. American Family Ins. Co.*, 978 F.2d 287, 299 (7th Cir. 1992).

174. *Id.* at 300-01.

175. *See* 42 U.S.C. §§ 3610-12, 3614a (1994 & Supp. II 1996).

the precedent to protect itself if it looked to the purposes and goals of the existing federal housing laws. Courts would have some explicit guidance in how to deal with a claim of source of income discrimination. Regulations by HUD would substantially diminish the current inconsistency in source of income discrimination jurisprudence.

CONCLUSION

The need for protection against discrimination by landlords against low-income families will only increase in the future unless remedial action is taken. We need to remember that children are twice as likely to live in poverty than adults, and minorities represent a disproportionate number of the poor in our society.¹⁷⁶ With a portion of our population at great susceptibility to this type of discrimination, we need to take a stand against this injustice to ensure that low-income families find affordable housing free from discrimination.

The existing protections found in housing law against source of income discrimination are inadequate. Victims of source of income discrimination can not be expected to rely upon the Fair Housing Act and mold their case into a protected category, hoping for the best. Likewise, prospective tenants cannot hope that they live in a state that protects them from being discriminated against because of their status as a Section 8 or TANF recipient. The inconsistency in the case law cannot provide any reassurance to those who might pursue a source of income suit but do not because of the fear that they will not succeed.¹⁷⁷

The three proposed solutions to the problem of source of income discrimination provide some creative guidance and display that there is not one right answer to this complex problem. The Beck model is representative of a straight-forward approach, amending existing law to include status as a subsidy holder as a protected classification under the Fair Housing Act.¹⁷⁸ The second alternative does not require an act by Congress, but it does require a courageous court to build a foundation for an implied prohibition based upon the purposes of Section 8 and TANF. The last alternative requires the least action, as HUD would need to promulgate regulations prohibiting source of income discrimination based upon an interpretation of existing federal housing law. This solution already has a foundation built by the Seventh Circuit case, *NAACP v. American Family Mutual Insurance Co.*¹⁷⁹

While the last solution seems to provide the most practical and efficient remedy to the injustice of source of income discrimination, all three have merit that can guide future debate. Regardless of which alternative one prefers, we as a society must do what is right in our hearts. We can no longer allow such a blatant attack on the poor.

Most do not know the extent of this discrimination, and this Note serves as

176. See KARGER & STOESZ, *supra* note 11, at 92-111.

177. See Telephone Interview with Charlene Anderson, *supra* note 87.

178. Beck, *supra* note 19; see also *supra* Part III.A.

179. 978 F.2d 287 (7th Cir. 1992).

an educational tool to explain the depth of the problem. If the majority of people knew of this problem, many would be outraged to discover that source of income discrimination is not protected by existing law. Even the highest of government officials believes source of income discrimination is protected by existing law. Andrew Cuomo, the Secretary of HUD, was asked on a radio political talk show, *Talk of the Nation*, whether a landlord can discriminate against a person on the basis that they have a Section 8 rental subsidy.¹⁸⁰ He answered that “you can’t discriminate against a person on the basis that he or she has a Section 8 rental subsidy. You can turn down a prospective tenant on bona fide meritorious grounds because it’s your building and you have a right to interview the tenant, but not solely on the grounds that they have a Section 8 subsidy.”¹⁸¹ The Secretary of HUD is obviously wrong, but his answer reflects the ignorance of the public about this problem. The bottom line is that a landlord can turn prospective tenants away based solely on their source of income, without any rational economic reason, and this practice must be stopped. The law should at least protect those whom the Secretary of HUD believes the law already protects.

180. *Talk of the Nation* (NPR radio broadcast, Mar. 3, 1997).

181. *Id.*

DISCOVERABILITY OF OPINION WORK PRODUCT MATERIALS PROVIDED TO TESTIFYING EXPERTS

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INTRODUCTION

The strong policy against disclosure of an attorney's thought processes was first articulated by the United States Supreme Court in *Hickman v. Taylor*.¹ The *Hickman* rule came to be known as the "work product rule," and was later codified in Federal Rule of Civil Procedure 26(b)(3) ("Rule 26(b)(3)").² The Rule establishes a qualified privilege for materials prepared by counsel in anticipation of litigation³ and offers special protection to "opinion work product," which encompasses documents containing an attorney's mental impressions, ideas, and opinions.⁴ At the same time, the federal rules provide for liberal discovery practices, particularly with regard to the opinions and testimony of expert witnesses.⁵ These two policies collide when an attorney shares work product materials with a testifying expert prior to trial, leaving courts and parties to guess at whether those materials are discoverable by the opposing party. As expert witnesses are used ever more frequently in modern litigation, the need for a decisive answer to this question becomes increasingly critical.

In general, Rule 26(b)(4) governs discovery of materials provided to experts. It protects materials provided to non-testifying experts and allows for discovery of materials related to testifying experts.⁶ Although factual information provided to testifying experts by counsel has consistently been held discoverable,⁷ courts have disagreed on the discoverability of opinion work product materials provided to experts.⁸ Despite the 1993 Amendments to the federal rules that purported to

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1. 329 U.S. 495 (1947).

2. FED. R. CIV. P. 26(b)(3).

3.

[D]ocuments and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative [are discoverable] only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Id.

4. *Id.*

5. See generally FED. R. CIV. P. 26.

6. FED. R. CIV. P. 26(b)(4).

7. See, e.g., *B.C.F. Oil Ref., Inc. v. Consolidated Edison Co.*, 171 F.R.D. 57, 62-63 (S.D.N.Y. 1997); *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 295 (W.D. Mich. 1995).

8. Compare *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 593-95 (3d Cir. 1984) (holding that opinion work product is absolutely privileged even though an expert relied on it in forming his

solve the issue through the addition of Rule 26(a)(2),⁹ which imposes initial disclosure requirements on testifying experts, courts continue to disagree. A split of authority currently exists among the federal districts, and no federal appellate court has spoken on the issue since the enactment of the 1993 Amendments to the Rules.¹⁰

Proponents for protection of opinion work product materials shared with expert witnesses stress the need for privacy and the free exchange of ideas in developing litigation strategy. Conversely, proponents for disclosure of such materials emphasize the opposing party's need to effectively cross-examine the expert regarding materials that may have improperly influenced that expert's testimony. The overriding question remains: Should experts be able to participate as advocates, or should they merely be disinterested third parties whose purpose is to educate the jury on matters beyond the common understanding?¹¹ The uncertainty in the law forces litigators to gamble: Give the expert the work product materials, reap the benefits, and hope that the court will not order disclosure, or keep the work product materials, forego the benefits, but be certain that valuable work product is protected.¹² Neither parties nor attorneys should be forced to engage in such a potentially disastrous game of chance.

This Note argues that a clear, uniform rule is needed, and that parties and courts should no longer be forced to guess at the mandates of Rule 26. Part I of this Note provides background information on the origins and evolution of the

opinion), *with Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384, 387 (N.D. Cal. 1991) (holding that all materials disclosed to an expert are discoverable notwithstanding that they constitute opinion work product).

9. FED. R. CIV. P. 26(a)(2)(B) (adding initial disclosure requirements for testifying experts).

10. *Compare Haworth, Inc.*, 162 F.R.D. at 292-94 (holding that protection of opinion work product under Rule 26(b)(3) prevails over production of documents considered by experts under Rule 26(a)(2)(B)), *with Karn v. Rand*, 168 F.R.D. 633, 638 (N.D. Ind. 1996) (holding that Rule 26(a)(2) is a bright-line rule that all documents provided to experts are discoverable).

Note that a related issue on which the federal districts are also split is the discoverability of work product materials reviewed by witnesses prior to or while testifying or being deposed pursuant to Federal Rule of Evidence 612. When work product materials are used to refresh an expert's memory prior to giving sworn testimony, they may be discoverable on this basis alone, notwithstanding the issues discussed in this note. *See, e.g., Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 615 (S.D.N.Y. 1977). For a discussion of Federal Rule of Evidence 612 as applied to work product materials reviewed by experts, see Martha J. Aaron, *Resolving the Conflict Between Federal Rule of Evidence 612 and the Work Product Doctrine: A Proposed Solution*, 38 U. KAN. L. REV. 1039 (1990); Lee Mickus, *Discovery of Work Product Disclosed to a Testifying Expert Under the 1993 Amendments to the Federal Rules of Civil Procedure*, 27 CREIGHTON L. REV. 773, 801-02 (1994).

11. *See Mickus, supra* note 10, at 778-79; George Vernon, *Protecting Your Expert from Discovery*, FOR THE DEFENSE, June 1989, at 16-17.

12. *See Mickus, supra* note 10, at 774-75; Michael E. Plunkett, Comment, *Discoverability of Attorney Work Product Reviewed by Expert Witnesses: Have the 1993 Revisions to the Federal Rules of Civil Procedure Changed Anything?*, 69 TEMP. L. REV. 451, 452 (1996).

work product rule, and explains the problem of discoverability of work product materials provided to testifying experts in light of its historical context. Part II examines the impact of the 1993 Amendments to Rule 26 on expert discovery and explains the subsequent development of the issue. Part III explains that both the text of the rule and sound policy dictate that work product materials provided to testifying experts should not be discoverable under Rule 26.¹³ Finally, this Note concludes that Rule 26 should be amended to clarify that Rule 26(b)(3) work product protection “trumps” Rule 26(a)(2) and Rule 26(b)(4) expert disclosure rules.

I. HISTORICAL CONTEXT AND BACKGROUND

A. *The Work Product Rule*

The work product doctrine was first announced by the U.S. Supreme Court

13. Although the remainder of this Note exclusively addresses opinion work product as it relates to experts who have been specially retained to provide testimony at trial, the proposed amendment certainly applies to all categories of experts. In general, experts (and applicable discovery rules) can be classified as follows:

1. Experts retained or specially employed in anticipation of litigation and who are expected to testify—discovery is governed by Federal Rule of Civil Procedure 26(a)(2)(A) (initial disclosure of identity), 26(a)(2)(B) (initial disclosure must be accompanied by written report), and 26(b)(4)(A) (depositions permitted; facts and opinions are wholly discoverable).
2. Experts retained or specially employed in anticipation of litigation but who are not expected to testify—discovery is governed by Federal Rule of Civil Procedure 26(b)(4)(B) (facts and opinions discoverable only upon a showing of exceptional circumstances).
3. In-house experts who regularly give expert testimony and who are expected to testify in present litigation—discovery is governed by Federal Rule of Civil Procedure 26(a)(2)(A) (initial disclosure of identity), 26(a)(2)(B) (initial disclosure must be accompanied by written report), and 26(b)(4)(A) (depositions permitted; facts and opinions are wholly discoverable).
4. In-house experts used in normal course of business but who are not expected to testify—facts and opinions are not discoverable.
5. Experts informally consulted regarding present litigation but not retained or specially employed in anticipation of litigation and not expected to testify—facts and opinions are not discoverable.
6. Other experts used in normal course of business but retained or consulted for purposes of present litigation—facts and opinions are not discoverable.

See generally Gregory P. Joseph, *Emerging Issues Under the 1993 Amendments to the Federal Civil Rules*, Q247 ALI-ABA 65, 86-93 (1996). This Note focuses on experts retained or specially employed in anticipation of litigation and who are expected to testify (category 1 above) because it is this category of experts for which the strongest arguments in favor of disclosure can be made. As noted above, the Rules almost completely protect from discovery information regarding non-testifying experts. See FED. R. CIV. P. 26.

in 1947 in the landmark case of *Hickman v. Taylor*,¹⁴ in which the Court recognized a “general policy against invading the privacy of an attorney’s course of preparation.”¹⁵ The Court found this policy to be “so essential to an orderly working of our system of legal procedure”¹⁶ that “[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.”¹⁷

In *Hickman*, the defendant owned a tugboat that sank, killing five of the nine crew members. The plaintiff represented the estate of one of the drowned crew members. After a public hearing in which the four survivors were examined, the defendant’s attorney interviewed them privately and took their statements with an eye toward litigation. The plaintiff sought production of defendant’s attorney’s notes taken during the interviews and also of the witnesses’ statements. In refusing to order disclosure, the Court stated, “[i]n performing his various duties . . . it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.”¹⁸ The Court reasoned that because “[p]roper preparation of a client’s case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference,”¹⁹ it would be “a rare situation . . . [that would justify] production of these matters.”²⁰

If an attorney’s theories and mental impressions were made available to the opposing party upon demand, the Court believed that “much of what is now put down in writing would remain unwritten. An attorney’s thoughts, heretofore inviolate, would not be his own.”²¹ The result would be that “[i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial.”²² Not only would this have a demoralizing effect on the legal profession, but it also would bring about the even more devastating consequence that “the interests of the clients and the cause of justice would be poorly served.”²³

The work product doctrine announced in *Hickman* was codified in 1970 in Rule 26(b)(3), which provides general protection for documents and tangible

14. 329 U.S. 495 (1947).

15. *Id.* at 512.

16. *Id.*

17. *Id.* at 510.

18. *Id.*

19. *Id.* at 511.

20. *Id.* at 513.

21. *Id.* at 511.

22. *Id.*

23. *Id.* See also *Upjohn Co. v. United States*, 449 U.S. 383, 398-402 (1981) (reiterating a desire to afford particular protection to attorneys’ opinion work product). Writing for a unanimous Court, Justice Rehnquist emphasized the “special protection [afforded] to work product revealing the attorney’s mental processes.” *Id.* at 400.

things prepared in anticipation of litigation.²⁴ One important difference between Rule 26(b)(3) and the *Hickman* rule, however, is that *Hickman* did not restrict the work product rule to documents and tangible things. It extended protection to all inquiries and requests seeking “counsel’s mental impressions, conclusions, or opinions.”²⁵ At least one court has held that when work product information sought to be discovered from an expert is something other than a document or tangible thing, courts should apply the more expansive rule of *Hickman v. Taylor*²⁶ rather than Rule 26(b)(3).²⁷

Under Rule 26(b)(3), protection is afforded not only to documents and tangible things prepared by attorneys, but also to those prepared by parties, consultants, sureties, indemnitors, insurers, and agents.²⁸ The rule “divides work product into two parts, one of which is ‘absolutely’ immune from discovery and the other only qualifiedly immune.”²⁹

The qualified immunity protects ordinary or “fact work product” materials, which are documents and tangible things prepared in anticipation of litigation but which do not contain the attorney’s mental impressions.³⁰ The first sentence of Rule 26(b)(3) provides that these materials are not discoverable unless the other party demonstrates a substantial need for them, in which case discovery will be permitted.³¹ The party resisting disclosure has the burden of establishing the documents’ eligibility for protection.³² Once a *prima facie* showing of privilege has been made, the party seeking discovery of such documents may only obtain them upon demonstration of “both a substantial need for the materials and that

24. See *supra* note 2.

25. *Maynard v. Whirlpool Corp.*, 160 F.R.D. 85, 87 (S.D. W. Va. 1995) (citing *Hickman v. Taylor*, 329 U.S. 495, 510 (1947)).

26. 329 U.S. 495 (1947).

27. *Maynard*, 160 F.R.D. at 87 (“[W]hen, as in this case, opposing counsel’s mental impressions, conclusions or opinions are sought in the context of a deposition, rather than as memorialized on paper, it is to the *Hickman* decision rather than Rule 26, that the Court must look in resolving the dispute.”).

28. FED. R. CIV. P. 26(b)(3). Although the principles expressed within this Note are equally applicable to all categories of protected persons, this Note addresses only attorneys’ work product materials.

29. *National Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992).

30. See Joseph, *supra* note 13, at 88.

31. Specifically, Rule 26(b)(3) provides:

[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule [(i.e., relevant and not privileged)] and prepared in anticipation of litigation or for trial . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

FED. R. CIV. P. 26(b)(3).

32. See *Binks Mfg. Co. v. National Presto Indus., Inc.*, 709 F.2d 1109, 1120 (7th Cir. 1983).

it would suffer undue hardship in procuring the requested information some other way.”³³

The (nearly) absolute immunity is contained in the second sentence of Rule 26(b)(3),³⁴ which offers even greater protection against disclosure of opinion work product, also known as core work product.³⁵ Opinion work product is comprised of materials prepared in anticipation of litigation, which include “the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.”³⁶ Opinion work product is not discoverable even upon a showing of substantial need by the party seeking discovery.³⁷ Accordingly, when a court orders discovery of the ordinary work product materials upon the required showing, it must protect opinion work product contained therein from discovery.³⁸

In determining whether a document has been prepared in anticipation of litigation such as to invoke work product protection, “the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.”³⁹ Litigation need not be imminent to satisfy the “because of the prospect of litigation” standard; however, “the primary motivating purpose behind the creation of a document or investigative report

33. *Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 976 (7th Cir. 1996) (footnotes omitted).

34. The second sentence of Rule 26(b)(3) provides: “In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” FED. R. CIV. P. 26(b)(3).

35. See Joseph, *supra* note 13, at 88.

36. *Logan*, 96 F.3d at 976 n.4 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 401-02 (1981)).

37. See *id.* at 976.

In short, to resolve whether Rule 26(b)(3) grants immunity from discovery, the district court must determine, from an examination of the documents or their circumstances, whether they were prepared in anticipation of litigation or for trial. If so and if the documents embody opinions and theories about the litigation, discovery is refused without further inquiry. If opinions and theories about the litigation are only part of a document otherwise discoverable, the court may require production of a redacted copy. With regard to other documents falling within the scope of Rule 26(b)(3), the court must determine whether the requesting party has a substantial need for them, taking into account their relevance and importance and the availability of the facts from other sources.

National Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 985 (4th Cir. 1992).

38. See FED. R. CIV. P. 26(b)(3).

39. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 604 (8th Cir. 1977) (quoting 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2024 (West 1973)).

must be to aid in possible future litigation.”⁴⁰ A party seeking to assert the privilege has the burden of proving “‘at the very least [that] some articulable claim, likely to lead to litigation, [has] arisen.’”⁴¹ Although courts will consider the fact that a claim was actually filed as a factor in making the determination, “[t]he mere fact that litigation does eventually ensue does not, by itself, cloak materials prepared by an attorney with the protection of the work product privilege.”⁴²

Once it has been determined that documents have been prepared in anticipation of litigation, courts have generally held that fact work product materials provided to a testifying expert are discoverable, regardless of whether the expert relied on them in forming his opinions.⁴³ “Rule 26(a)(2) specifically requires disclosure of factual information considered but not relied upon, as well as the information that was considered and relied upon.”⁴⁴ Although it has been argued that an attorney’s selection of facts reflects opinion work product,⁴⁵ “[i]t would strain credulity to maintain that the Rule somehow exempts factual

40. *Binks Mfg. Co. v. National Presto Indus., Inc.*, 709 F.2d 1109, 1119 (7th Cir. 1983) (quoting *Janicker v. George Washington Univ.*, 94 F.R.D. 648, 650 (D.D.C. 1982)).

41. *Id.* (quoting *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 865 (D.C. Cir. 1980)).

42. *Id.* at 1118. A survey of the case law indicates that courts have held the following events sufficient to trigger the application of the work product privilege: (1) investigation by a federal agency, *Martin v. Monfort, Inc.*, 150 F.R.D. 172, 173 (D. Colo. 1993); (2) receipt of a letter from an attorney saying that they planned to file suit within two weeks if settlement was not reached, *Henderson v. Zurn Industries, Inc.*, 131 F.R.D. 560, 571 (S.D. Ind. 1990); (3) consultation with an attorney during an insurance claims investigation, *Taroli v. General Electric Co.*, 114 F.R.D. 97, 99 (N.D. Ind. 1987); (4) denial of an insurance claim, *Logan v. Commercial Union Insurance Co.*, 96 F.3d 971, 977 (7th Cir. 1996); (5) mailing of notice of denial of an insurance claim, *Harper v. Auto-Owners Insurance Co.*, 138 F.R.D. 655, 665 (S.D. Ind. 1991); (6) crash of a commercial airliner, *In re Air Crash Disaster at Detroit Metropolitan Airport*, 130 F.R.D. 641, 644 (E.D. Mich. 1989); and (7) testimony in front of a grand jury, *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 491 (7th Cir. 1970), *aff’d per curiam by an equally divided Court*, 400 U.S. 348 (1971).

Courts have held that the following events do not automatically trigger application of the work product doctrine: (1) the fact that litigation ultimately ensues, *Logan*, 96 F.3d at 976; (2) receipt of letters generally threatening litigation, *Binks*, 709 F.2d at 1120; (3) learning that a party has consulted an attorney, *Taroli*, 114 F.R.D. at 98; (4) investigation of a claim by either party, *Harper*, 138 F.R.D. at 660; (5) negotiations over a claim, *id.*; (6) determination by a fire department that the cause of an insured’s fire was arson, *id.* at 667; and (7) routine investigation events that could lead to litigation, *In re Air Crash Near Roselawn, Indiana*, No. 95C4593, MDL 1070, 1997 WL 97096 (N.D. Ill. Feb. 25, 1997).

43. *See B.C.F. Oil Ref., Inc. v. Consolidated Edison Co.*, 171 F.R.D. 57, 62-63 (S.D.N.Y. 1997); *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 294-99 (W.D. Mich. 1995); *In re Air Crash Disaster at Stapleton Int’l Airport, Denver, Colo.*, 720 F. Supp. 1442, 1444 (D. Colo. 1988).

44. *Haworth, Inc.*, 162 F.R.D. at 296 (citing FED. R. CIV. P. 26(a)(2)).

45. *See id.* at 295 n.5 (citing *Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir. 1985)).

information that counsel gave the expert.”⁴⁶ Even though an attorney may have an interest in his sifting of the facts,⁴⁷ the interest is “considerably outweighed . . . by the need of the adversary to know the basis of the expert’s opinion.”⁴⁸ The law is less clear on the discoverability of opinion work product materials provided to a testifying expert.

*B. State of the Law Prior to the 1993 Amendments to the
Federal Rules of Civil Procedure*

The uncertainty regarding whether the work product doctrine protects opinion work product materials provided to a testifying expert arises from unclear language in Rule 26. Before the 1993 Amendments to Rule 26, which added initial disclosure requirements with regard to testifying experts,⁴⁹ courts considering whether work product materials provided to experts should be disclosed had to determine the relationship between Rules 26(b)(3) (the work product rule) and 26(b)(4) (the expert discovery rule).

The primary confusion surrounded the phrase, “[s]ubject to the provisions of subdivision (b)(4) of this rule,” at the beginning of the work product rule.⁵⁰ The question was whether that phrase was meant to apply only to the first sentence of that paragraph (the general work product rule providing that materials prepared in anticipation of trial are discoverable only upon a showing of need),⁵¹ or if it was also meant to apply to the second sentence (the opinion work product rule providing that an attorney’s mental impressions are not discoverable notwithstanding a showing of substantial need).⁵² If the drafters intended the phrase to apply only to the first sentence, then the opinion work product rule in the second sentence is not subject to subdivision (b)(4) (the expert discovery rule), and opinion work product given to experts is not discoverable pursuant to subdivision (b)(3).⁵³ Conversely, if the phrase applied to both sentences, then the expert discovery rule prevails over both, and opinion work product given to experts is discoverable.⁵⁴ The Third Circuit, the only federal appellate court to have considered the issue to date, chose the former interpretation;⁵⁵ however, that decision has recently been criticized.⁵⁶

46. *B.C.F. Oil Ref., Inc.*, 171 F.R.D. at 63.

47. *See Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

48. *B.C.F. Oil Ref., Inc.*, 171 F.R.D. at 63.

49. FED. R. CIV. P. 26(a)(2).

50. FED. R. CIV. P. 26(b)(3).

51. *Id.*

52. *Id.*

53. *See Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 594 (3d Cir. 1984).

54. *See Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384, 387-88 (N.D. Cal. 1991).

55. *Bogosian*, 738 F.2d at 594; *see also* *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 292 (W.D. Mich. 1995).

56. *See Karn v. Rand*, 168 F.R.D. 633, 636 (N.D. Ind. 1996); *Furniture World, Inc. v. D.A.V. Thrift Stores, Inc.*, 168 F.R.D. 61 (D.N.M. 1996); *United States v. City of Torrance*, 163

The pre-1993 cases addressing discovery of work product materials provided to experts can largely be categorized as either protection-oriented or discovery-oriented.⁵⁷ In 1984 the Third Circuit announced the leading and most strongly protection-oriented approach in *Bogosian v. Gulf Oil Corp.*⁵⁸ In ruling that work product materials provided to testifying experts are not discoverable, the court held that “subdivision (b)(4) [is] not exempt from (b)(3) protection against disclosure of attorney mental impressions.”⁵⁹ The court stated that the “thrust of Rule 26(b)(4) is to permit discovery of facts known or opinions held by the expert.”⁶⁰ The defendants argued that they could not effectively cross-examine the expert without knowing the extent to which the lawyer had shaped the expert’s testimony. The court disagreed, believing that the defendants could effectively cross-examine the expert on the basis of his opinion without revealing the extent of the lawyer’s influence.⁶¹ “[T]he marginal value in the revelation on cross-examination that the expert’s view may have originated with an attorney’s opinion or theory does not warrant overriding the strong policy against disclosure of documents consisting of core attorney’s work product.”⁶²

Relying heavily on *Hickman*,⁶³ the court further reasoned that if attorneys did not feel confident that their theories would be protected from disclosure, “the freedom of thought essential to carefully reasoned trial preparation would be inhibited.”⁶⁴ Although some of the other pre-1993 protection-oriented approaches were more moderate, the *Bogosian* approach was widely followed.⁶⁵

F.R.D. 590, 593-94 (C.D. Cal. 1995); *United States Energy Corp. v. Nukem, Inc.*, 163 F.R.D. 344, 348 (D. Colo. 1995); *Rail Intermodal Specialists, Inc. v. General Elec. Capital Corp.*, 154 F.R.D. 218, 220-21 (N.D. Iowa 1994).

57. See Mickus, *supra* note 10, at 776; Plunkett, *supra* note 12, at 455-67.

58. 738 F.2d 587 (3d Cir. 1984). *Bogosian* was an antitrust class action by lessee oil dealers against major oil companies in which plaintiffs sought a writ of mandamus to direct the district court judge to vacate orders compelling production of documents reviewed by plaintiffs’ expert and prepared by plaintiffs’ counsel. The documents wholly consisted of counsel’s mental impressions, thought processes, opinions, and legal theories. *Id.* at 588.

59. *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 292 (W.D. Mich. 1995) (citing *Bogosian*, 738 F.2d at 594).

60. *Bogosian*, 738 F.2d at 595.

61. *Id.*

62. *Id.*

63. *Hickman v. Taylor*, 329 U.S. 495 (1947).

64. *Bogosian*, 738 F.2d at 593.

65. See *Toledo Edison Co. v. GA Techs., Inc.*, 847 F.2d 335, 340 (6th Cir. 1988) (holding that “the rule flatly states that the court is not to permit discovery of ‘mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the party concerning the litigation.’”); *Natta v. Zletz*, 418 F.2d 633, 638 (7th Cir. 1969) (holding that letters from an attorney to a testifying expert were not discoverable absent a showing of exceptional circumstances under *Hickman*); *In re Aircraft Accident Near Prineville, Or.*, 7 Fed. R. Serv. 3d 260 (D. Or. 1987) (holding that letters to experts from counsel were protected under the work product privilege).

The leading and most extreme discovery-oriented approach prior to the 1993 Amendments was articulated in *Intermedics, Inc. v. Ventritex, Inc.*,⁶⁶ a decision announced by the Northern District of California seven years after the Third Circuit decided *Bogosian*. In granting a motion to compel discovery of counsel's work product provided to a testifying witness, the court held that

absent an extraordinary showing of unfairness that goes well beyond the interests generally protected by the work product doctrine, written and oral communications from a lawyer to an expert that are related to matters about which the expert will offer testimony are discoverable, even when those communications otherwise would be deemed opinion work product.⁶⁷

In so holding, the court expressly rejected the Third Circuit's analysis and holding in *Bogosian*,⁶⁸ and instead relied in part on two earlier Colorado cases.⁶⁹ The court disagreed with the view expressed in *Bogosian* that the purpose of Rule 26(b)(4) is to permit discovery only of the facts known or opinions held by the expert.⁷⁰ Instead, the court stated, "[i]t is clear that the interests that are intended to be advanced by paragraph (4) of Federal Rule of Civil Procedure 26(b) include nothing less than the integrity and reliability of the truth-finding process."⁷¹ Given these interests and the Advisory Committee Notes to the 1970 Amendments to Rule 26,⁷² the court believed that "[t]he drafters' goal in writing

66. 139 F.R.D. 384 (N.D. Cal. 1991). *Intermedics* was a patent infringement and misappropriation of trade secrets action in which defendants moved to compel both answers to questions posed at plaintiff's expert's deposition regarding information told to him by plaintiff's counsel and production of documents prepared by plaintiff's counsel and given to the expert. *Id.* at 385.

67. *Id.* at 387.

68. *Id.* ("While we do so with trepidation, and in full recognition that this is an area in which there is considerable room within which thoughtful judges can reach different conclusions, we respectfully disagree with the analysis and holding of the *Bogosian* majority.").

69. See *In re Air Crash Disaster at Stapleton Int'l Airport*, Denver, Colo., 720 F. Supp. 1442 (D. Colo. 1988); *Boring v. Keller*, 97 F.R.D. 404 (D. Colo. 1983). Both cases held that "[t]he work product privilege 'is no exception to discovery under circumstances where documents which contain [an attorney's] mental impressions are examined and reviewed by expert witnesses before their expert opinions are formed.'" *In re Crash Disaster*, 720 F. Supp. at 1444 (quoting *Boring*, 97 F.R.D. at 406-07). Accord *William Penn Life Assurance Co. of Am. v. Brown Transfer & Storage Co.*, 141 F.R.D. 142, 143 (W.D. Mo. 1990) ("Without discovery of such material the adversary is deprived of the opportunity to adequately explore the extent to which counsel's observations affected the expert's opinion, and to impeach the expert on that basis.") (citing *Boring*, 97 F.R.D. at 408).

70. See *supra* note 60 and accompanying text.

71. *Intermedics*, 139 F.R.D. at 394.

72. *Id.* at 388. The Advisory Committee Notes "reject as ill-considered the decisions which have sought to bring expert information within the work product doctrine." *Id.* (quoting the 1970 Amendments Advisory Committee Notes, FED. R. CIV. P. 26 (amended 1993)).

the second sentence of [paragraph (b)(3)] was simply to make sure that special protection attached to the opinion work product, not to suggest that the first sentence's proviso [that the rule was subject to 26(b)(4)] was applicable only to non-opinion work product."⁷³ The court suggested that the conclusion in *Bogosian* that only the first sentence of 26(b)(3) was meant to be subject to subdivision (b)(4) was unclear and without foundation.⁷⁴

The court also disagreed with the view expressed in *Bogosian* that cross-examination of expert witnesses could be effective without delving into the extent to which counsel's thoughts and opinions were shared with the expert.⁷⁵ The court reasoned that because the factual information considered by the expert was already discoverable regardless of its source, only two kinds of things would be protected by the *Bogosian* rule: (1) counsel's organization of the information shared with the expert, and (2) counsel's thoughts and impressions of that information.⁷⁶ The latter category would include counsel's "editorial comments about [the data's] relative significance, suggestions about how to interpret the data, or how to package it for presentation by the expert while testifying, or about what inferences should be drawn from it, what meanings should be ascribed to it, or what generalizations it supports."⁷⁷ The court felt that if these types of communications were to be protected, the independence of the experts' opinions, and thus "the integrity and reliability of the truth finding process" would be threatened.⁷⁸ Because experts present opinions and reasoning as their own, the court believed that "[k]nowing that some or all of the reasoning and opinion that is being presented by an expert is not her own, but is a lawyer's, might well have an appreciable effect on the probative value the trier of fact ascribes to the expert testimony."⁷⁹

Other pre-1993 cases took a more moderate discovery-oriented approach. One court held that work product materials relied on by the expert were discoverable under a waiver theory, but that work product materials merely reviewed by the expert were not.⁸⁰ This approach was criticized by the court in *Intermedics* on fairness grounds: "[A] finding of waiver requires a showing that a person voluntarily has given up a known right. . . . [But] the courts have developed nothing approaching a clear consensus about what consequences, if any, attach to sharing such documents with a testifying expert."⁸¹ Another court was willing to order disclosure of opinion work product materials provided to a

73. *Id.* at 389.

74. *Id.* at 388.

75. *Id.* at 393-94; *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 595 (3d Cir. 1984).

76. *Intermedics*, 139 F.R.D. at 393.

77. *Id.*

78. *Id.* at 394.

79. *Id.* at 395.

80. *Trimec, Inc. v. Zale Corp.*, No. 86-C3885, 1992 WL 245602, at *2 (N.D. Ill. Sept. 23, 1992); see also Mickus, *supra* note 10, at 776.

81. *Intermedics*, 139 F.R.D. at 391.

testifying expert, but only upon a Rule 26(b)(3) showing of substantial need.⁸² Yet another court, in *Occulto v. Adamar of New Jersey Inc.*,⁸³ adopted a balancing approach “in which the most important factors were the degree to which the expert’s opinion derived from the alleged work product and whether the alleged work product was primarily factual or ‘laced with the attorney’s intimate observations.’”⁸⁴

The 1993 Amendments have furthered the uncertainty in the relationship between Rules 26(b)(3) and 26(b)(4).⁸⁵ The phrase, “[s]ubject to the provisions of subdivision (b)(4) of this rule,”⁸⁶ at the beginning of subdivision (b)(3) has survived, and neither the text of amended Rule 26 nor the Advisory Committee Notes answer the question of exactly what in the rule is subject to subdivision (b)(4). Although the 1993 Amendments made such sweeping changes to expert discovery that at least one court has suggested that the reasoning of pre-1993 cases no longer applies,⁸⁷ many courts and commentators believe that the pre-1993 approaches remain viable solutions to the lingering expert discovery problems.⁸⁸

C. The 1993 Amendments

The 1993 Amendments to the Federal Rules of Civil Procedure became effective on December 1 of that year, with many of the most significant changes occurring within Rule 26. These changes added initial disclosure requirements with regard to testifying experts, expanded expert disclosure obligations from material known by experts to material considered by experts, and added a provision allowing a party to depose the opposing party’s expert(s).⁸⁹ At least one court has commented that the “reasoning of those cases interpreting the Rule prior to 1993 on this subject is probably obsolete.”⁹⁰

The amendments brought the addition of Rule 26(a)(2), entitled “Disclosure of Expert Testimony.”⁹¹ As a result, parties can no longer wait until they receive formal discovery requests to disclose information regarding expert witnesses who are expected to testify, and instead are required to make disclosures automatically.⁹² Included in those mandatory disclosures are the identity of any

82. See *Hamel v. General Motors Corp.*, 128 F.R.D. 281, 284-85 (D. Kan. 1989).

83. 125 F.R.D. 611 (D.N.J. 1989).

84. *B.C.F. Oil Ref., Inc. v. Consolidated Edison Co.*, 171 F.R.D. 57, 65 (S.D.N.Y. 1997) (quoting *Occulto v. Adamar of New Jersey, Inc.*, 125 F.R.D. 611, 615-16 (D.N.J. 1989)).

85. See *infra* notes 100-43 and accompanying text.

86. FED. R. CIV. P. 26(b)(3).

87. See *B.C.F. Oil Ref., Inc.*, 171 F.R.D. at 65.

88. See generally *Mickus*, *supra* note 10, at 778.

89. See FED. R. CIV. P. 26.

90. *B.C.F. Oil Ref., Inc.*, 171 F.R.D. at 65.

91. FED. R. CIV. P. 26(a)(2).

92. Unless otherwise agreed or directed by the court, the parties must make these disclosures at least 90 days prior to the date that the case is to be ready for trial. See FED. R. CIV. P.

persons “specially employed to provide expert testimony in the case” and a report prepared and signed by that person containing

a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.⁹³

An evasive or incomplete disclosure is treated as a failure to disclose, with the consequences possibly including preclusion of the undisclosed testimony or exhibits or other sanctions pursuant to Rule 37(c)(1).⁹⁴

In addition to adding the mandatory disclosures, the 1993 Amendments broadened the scope of discoverable information from material “known by experts”⁹⁵ to material “considered by” experts.⁹⁶ “‘Consider’ is defined as ‘[t]o think about seriously,’ ‘[t]o regard,’ ‘[t]o take into account,’ and/or ‘[t]o bear in mind,’”⁹⁷ which is clearly a broader concept than materials merely relied upon.⁹⁸ The effect is that materials that the expert reviewed but on which he did not rely in forming his opinion are no longer protected from discovery.⁹⁹

The 1993 Amendments also introduced a provision allowing for a new

26(a)(2)(C). If the testimony is solely intended for rebuttal purposes, the disclosures must be made within 30 days after the disclosure by the other party which this testimony is intended to rebut. *See id.*

93. FED. R. CIV. P. 26(a)(2)(B). *See also* Joseph, *supra* note 13, at 98.

94. *See* Joseph, *supra* note 13, at 98-99. Under Rule 37(c)(1), a party failing to make a disclosure or to supplement disclosure responses under Rule 26 may not “present as substantive evidence or on summary judgment (or other) motion any evidence not so disclosed, unless there is ‘substantial justification’ for the failure to disclose or unless the ‘failure is harmless.’” *Id.* at 99. However, this automatic preclusion may be subject to principles of fundamental fairness. *See id.* For cases applying Rule 37 sanctions to nondisclosure under Rule 26(a)(2), *see id.* at 99 nn.4-6.

95. FED. R. CIV. P. 26(b)(4) (amended 1993).

96. FED. R. CIV. P. 26(a)(2)(B).

97. George E. Lieberman, ESQ., *Experts and the Discovery/Disclosure of Protected Communication*, 43-FEB. R.I. BUS. J. 7, 10 (1995) (quoting WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY 301 (Riverside Pub. Co. 1988)).

98. *See* Karn v. Rand, 168 F.R.D. 633, 635 (N.D. Ind. 1996).

99. *See* Baxter Diagnostics, Inc. v. AVL Scientific Corp., No. CV91-4178-RG, 1993 WL 360674 (C.D. Cal. Aug. 6, 1993). The court stated:

The word “considered,” as used herein, is intended to encompass: (a) all documents and oral communications relied upon by the experts in formulating their opinions; and (b) all documents and oral communications reviewed by the experts in connection with the formulation of their opinions, but ultimately rejected or not relied upon.

Id. at *1.

method of discovery regarding expert witnesses—the deposition.¹⁰⁰ Prior to the 1993 Amendments, Rule 26 allowed a party to obtain information from expert witnesses only through the use of interrogatories unless the court ordered additional discovery.¹⁰¹ Amended Rule 26(b)(4) allows parties to take depositions of opposing parties' testifying experts after receiving the experts' reports pursuant to Rule 26(a)(2)(B).¹⁰²

Although these changes may seem clear on their face, courts have disagreed on their effect upon the status of opinion work product materials shared with testifying experts. Unfortunately, the Advisory Committee Notes to the 1993 Amendments for Rule 26 have not helped. The Advisory Committee Notes state that

[g]iven this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.¹⁰³

Although this language has been interpreted by many courts to create a “bright-line” rule that all materials provided to experts are discoverable,¹⁰⁴ others have continued to follow *Bogosian*'s holding that this comment only addresses fact work product and that opinion work product materials given to testifying experts are not discoverable.¹⁰⁵

II. DEVELOPMENT OF THE ISSUE SINCE THE 1993 AMENDMENTS

The law regarding disclosure of work product materials provided to testifying experts is not well-settled, and “there is considerable room within which thoughtful judges can reach different conclusions.”¹⁰⁶ Although it is generally accepted that fact-oriented work product materials, those not containing attorneys' mental impressions, are discoverable,¹⁰⁷ federal district courts have continued to report inconsistent decisions regarding the discoverability of opinion work product materials. No federal appellate court has considered the issue since the 1993 Amendments.

Post-1993 cases may still be accurately described as either discovery-oriented

100. See FED. R. CIV. P. 26(b)(4).

101. FED. R. CIV. P. 26(b)(4) (amended 1993).

102. FED. R. CIV. P. 26(b)(4)(A). Note, however, that a party deposing another party's expert must “pay the expert a reasonable fee for the time spent in responding to discovery.” FED. R. CIV. P. 26(b)(4)(C).

103. FED. R. CIV. P. 26, 1993 Amendments Advisory Committee Notes.

104. See *Karn v. Rand*, 168 F.R.D. 633, 638 (N.D. Ind. 1996).

105. See *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 294-96 (W.D. Mich. 1995).

106. *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384, 387 (N.D. Cal. 1991).

107. See *Joseph*, *supra* note 13, at 88 (“[T]he cases leave little doubt that compilations of factual materials provided to experts (i.e., ordinary work product) may be discovered.”).

or protection-oriented.¹⁰⁸ Many discovery-oriented opinions have essentially relied on the policies and reasoning set forth in *Intermedics* despite the 1993 Amendments.¹⁰⁹ One court even expressed an opinion that the *Intermedics* reasoning makes even more sense in light of the 1993 Amendments.¹¹⁰ However, the leading opinion of *Karn v. Rand*¹¹¹ has stated that although *Intermedics* “provides thoughtful and instructive reasoning, the analysis it espouses has become unnecessary in light of the new Rule.”¹¹²

The court in *Karn* reviewed the pre-1993 discrepancy between the *Bogosian* line of cases and the *Intermedics* line of cases, and determined that “[a]gainst this historical backdrop, it becomes plainly evident that the text of the new Rule, supported by its accompanying commentary, was designed to mandate full disclosure of those materials reviewed by an expert witness, regardless of whether they constitute opinion work product.”¹¹³ The court found that the drafters of the 1993 Amendments considered the confusion surrounding the discoverability of opinion work product materials under Rules 26(b)(3) and 26(b)(4), and attempted to clearly resolve it by providing that expert disclosure under 26(a)(2) “trump” any claims of privilege.¹¹⁴ *Karn* declared that the 1993 Amendments “unambiguously provide a ‘bright-line’ rule” mandating disclosure of opinion work product materials provided to experts.¹¹⁵

Aside from the “bright-line” rule purportedly created by the 1993 Amendments, *Karn* explained that such a rule also makes sense on several policy grounds: “[E]ffective cross examination of expert witnesses will be enhanced; the policies underlying the work product doctrine will not be violated; and, finally, litigation certainty will be achieved—counsel will know exactly what documents will be subject to disclosure and can react accordingly.”¹¹⁶ The court

108. See Plunkett, *supra* note 12, at 470-75.

109. See, e.g., *Barna v. United States*, No. 95C6552, 1997 WL 417847, at *2 (N.D. Ill. July 28, 1997) (holding that “any information considered by a testifying expert in forming his opinion on an issue, even if that information contains attorney opinion work product, is discoverable”); *Furniture World, Inc. v. D.A.V. Thrift Stores, Inc.*, 168 F.R.D. 61, 62 (D.N.M. 1996) (“The reasoning in *Intermedics* is made even more compelling in light of the revisions contained in Rule 26(a)(2).”); *United States v. City of Torrance*, 163 F.R.D. 590, 593 (C.D. Cal. 1995) (holding that “[t]he approach which is most consistent with the purpose of the Federal Rules of Civil Procedure is to require disclosure”); *United States Energy Corp. v. Nukem, Inc.*, 163 F.R.D. 344, 348 (D. Colo. 1995) (holding that when work product documents have been turned over to an expert, “the protection has been waived because immunized materials should not remain undiscoverable after they have been used to influence and shape testimony”) (citing *Boring v. Keller*, 97 F.R.D. 404 (D. Colo. 1983)).

110. See *Furniture World, Inc.*, 168 F.R.D. at 62.

111. 168 F.R.D. 633 (N.D. Ind. 1996).

112. *Id.* at 639.

113. *Id.* at 637.

114. *Id.* at 639.

115. *Id.* at 638.

116. *Id.* at 639.

believed that the purpose of the work product doctrine as declared by *Hickman* is to provide counsel with latitude to develop new legal theories without knowing beforehand if they will be favorable to the client's case.¹¹⁷ Because providing work product materials to experts does not normally result in the development of new legal theories, the court reasoned that mandating disclosure of those materials does not violate the *Hickman* rule.¹¹⁸

The Southern District of New York recently followed *Karn* in *B.C.F. Oil Refining, Inc. v. Consolidated Edison Co.*¹¹⁹ In *B.C.F.* the court approvingly cited *Karn*'s three policy reasons for creating a "bright-line" rule in favor of disclosure,¹²⁰ and made the additional observation that "this reading of Rule 26(b) is consistent with the intent of the drafters of the 1993 Amendment."¹²¹ The court reasoned that a primary purpose of the amendments was to resolve the conflict between work product protection and expert discovery and "to mandate disclosure despite privilege."¹²²

Other courts ordering discovery of opinion work product materials provided to testifying experts tend to focus more heavily on the argument that disclosure of opinion work product material provided to an expert is necessary for effective cross-examination of the expert. The court in *Barna v. United States*¹²³ went beyond *Intermedics*, explaining that disclosure is essential to the truth-finding process: "Without this form of discovery, expert testimony may become another way in which counsel places his view of the case or the evidence in front of the jury. . . ."¹²⁴ The court urged that allowing presentation of counsel's views in this way effectively deprives opposing counsel of grounds for cross-examination because, when espoused by an expert, counsel's views are "presented to the jury with an air of authority and a stamp of scientific validity."¹²⁵ The court in *Musselman v. Phillips*¹²⁶ followed *Barna*'s reasoning and added that without disclosure of opinion work product provided to experts, parties would be unable to reveal weaknesses in expert testimony that might affect its admissibility.¹²⁷ This would prevent trial courts from effectively performing their "gatekeeping" function with regard to expert testimony¹²⁸ as contemplated by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹²⁹

117. *Id.* at 640.

118. *Id.*

119. 171 F.R.D. 57 (S.D.N.Y. 1997).

120. *Id.* at 66.

121. *Id.*

122. *Id.* (quoting 8 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2016.2, at 252 (2d ed. 1994)).

123. No. 95C6552, 1997 WL 417847 (N.D. Ill. July 23, 1997).

124. *Id.* at *2.

125. *Id.*

126. 176 F.R.D. 194 (D. Md. 1997).

127. *Id.* at 200-01.

128. *See id.*

129. 509 U.S. 579, 595 (1993) (contemplating that trial judges would rely on scientific

Although the reasoning of these cases may have appeal, many post-1993 cases have adopted a protection-oriented approach and determined that Rule 26 only requires disclosure of fact work product materials provided to experts, while opinion work product materials remain protected. These cases tend to point to the strong protection for an attorney's theories and mental impressions described in *Hickman*.¹³⁰

At least one court has held that Rule 26 is not applicable in cases in which the information sought to be discovered from the expert is something other than a document or tangible thing.¹³¹ In *Maynard v. Whirlpool Corp.*,¹³² the plaintiffs made a motion to compel the defendant's expert to respond to deposition questions inquiring about prior statements made by the defendant's counsel regarding a former expert with whom counsel was presumably dissatisfied. The court determined that Rule 26(b)(3) did not apply because the information sought was not a document or other tangible thing, and thus turned to *Hickman* for the rule of law.¹³³ After reviewing the *Hickman* decision, the court held that "an attorney's opinion work product is nearly, if not absolutely, privileged."¹³⁴

The leading post-1993 protection-oriented case construing amended Rule 26 is *Haworth, Inc. v. Herman Miller, Inc.*¹³⁵ *Haworth* was a patent infringement action in which the plaintiff appealed a magistrate's order granting the defendant's motion to compel the plaintiff's expert to testify about all communications that he had with the plaintiff's attorneys. The plaintiff argued that the materials were protected opinion work product. In reversing the magistrate's order, the court held that Rule 26 and the Advisory Committee

weaknesses revealed during effective cross-examination of expert witnesses to determine the admissibility of the evidence); *Musselman*, 176 F.R.D. 194 at 199-200.

130. See, e.g., *Kennedy v. Baptist Mem'l Hosp.-Booneville, Inc.*, No. 1:96CV339-S-D, 1998 WL 208999, at *3 (N.D. Miss. Apr. 23, 1998) (quoting *Musselman*, 176 F.R.D. at 200) (Attorney work product disclosed to a testifying expert will be discoverable "[o]nly when an event occurs which puts the opponent on notice that counsel may have 'interjected him or herself into the process by which a testifying expert forms the opinions to be testified to at trial'"); *Ambrose v. Southworth Prods. Corp.*, No. CIV.A.95-0048-H, 1997 WL 470359, at *1 (W.D. Va. June 24, 1997) (noting that "[i]f and when further discovery of experts is ordered by the court, following the procedure outlined in Rule 26(b), the parties should note that such disclosure may still be limited by the needs of the defendant to prepare for trial"); *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 642 (E.D.N.Y. 1997) (holding that "the data or other information considered by [an expert] witness in forming [his] opinions' required to be disclosed in the expert's report mandated under Rule 26(a)(2)(B) extends only to factual materials, and not to core attorney work product considered by an expert"); *All West Pet Supply Co. v. Hill's Pet Prod. Div.*, 152 F.R.D. 634, 638-39 (D. Kan. 1993).

131. See *Maynard v. Whirlpool Corp.*, 160 F.R.D. 85, 87 (S.D. W. Va. 1995).

132. *Id.*

133. *Id.*

134. *Id.* at 88 (citing *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 734 (4th Cir. 1974)).

135. 162 F.R.D. 289 (W.D. Mich. 1995).

Notes require "only that all factual information considered by the expert must be disclosed."¹³⁶ The court believed that the 1993 Amendments merely eliminate the need for the opposing party to make a motion to compel production of such materials and for the judge to order redaction of opinion work product contained therein.¹³⁷

The court reasoned, "[f]or the high privilege accorded attorney opinion work product not to apply would require clear and unambiguous language in a statute. No such language appears here."¹³⁸ Consequently, the court held that "the protection accorded an attorney's mental impressions and opinions by the Supreme Court in *Hickman v. Taylor*,¹³⁹ and substantially codified in 1970 in Rule 26(b)(3), was intended to apply to discovery from experts."¹⁴⁰

In response to arguments that disclosure of opinion work product materials provided to experts is necessary for effective cross examination, the court in *Haworth* noted that "[t]he risk of an attorney influencing an expert witness does not go unchecked in the adversarial system, for the reasonableness of an expert opinion can be judged against the knowledge of the expert's field and is always subject to the scrutiny of other experts."¹⁴¹ The court pointed out that the Supreme Court in *Hickman* stated that it would be "'a rare situation' which would justify disclosure of attorney opinion work product."¹⁴² In light of this mandate, the court in *Haworth* determined that "a more effective cross-examination and impeachment of the opposing party's expert witness . . . is not the type of circumstance the Supreme Court contemplated would overcome the strong policy against disclosing an attorney's opinion work product."¹⁴³

As evidenced by the above cases, the federal districts are not moving toward agreement on the issue of discoverability of opinion work product materials provided to expert witnesses. The issue is being confronted with increasing frequency, and parties are in need of a clear, uniform rule.

III. ARGUMENT

A uniform standard is needed given the uncertainty faced by parties to litigation and the widely divergent approaches adopted by the federal districts with regard to opinion work product materials furnished to expert witnesses. Does amended Rule 26 require that an attorney withhold valuable work product materials from a testifying expert if she wishes them to remain unreachable by the opposing party? Does a party have to hire multiple experts, some of whom

136. *Id.* at 295 (citing *All West Pet Supply Co. v. Hill's Pet Prod. Div.*, 152 F.R.D. 634, 639 n.9 (D. Kan. 1993)).

137. *Id.* (citations omitted).

138. *Id.* (citing *Hickman v. Taylor*, 329 U.S. 495, 514 (1947)).

139. 329 U.S. 495 (1947).

140. *Haworth, Inc.*, 162 F.R.D. at 294.

141. *Id.* at 295-96.

142. *Id.* at 295 (quoting *Hickman*, 329 U.S. at 513).

143. *Id.*

will testify and some of whom will not, if it wishes to engage in confidential discussions with an expert about the attorney's theories or litigation strategy? The answer to both of these questions should be a resounding no. Amended Rule 26 does not require that opinion work product materials shared with testifying experts be disclosed to the opposing party. Rule 26 should be amended to clarify that the work product rule "trumps" the provisions addressing expert discovery.

A. The Drafters' Intent

Given the extent of the controversy regarding discoverability of work product materials provided to testifying experts prior to the 1993 Amendments to Rule 26, the drafters would have explicitly created a "bright-line" rule mandating disclosure of opinion work product if they had intended such a result. As demonstrated by the wealth of post-1993 case law on the topic,¹⁴⁴ such a "bright-line" rule does not exist. Contrary to the declarations of the *Karn v. Rand*¹⁴⁵ line of cases, the text of Rule 26 does not create a clear rule mandating discovery.

One commentator has argued that it is illogical to construe the new rules as protecting opinion work product given to experts because that would mean that the 1993 Amendments did "not affect what information another party is entitled to obtain, but only how the party is entitled to obtain it."¹⁴⁶ The claim is that the title and text of Rule 26(a)(2) contradict that conclusion.¹⁴⁷ However, this argument is inaccurate and simply ignores one of the major changes to Rule 26. Even if opinion work product given to testifying experts is protected under the new Rule, amended Rule 26 expands the category of information that a party is entitled to obtain from material "known by" experts to material "considered by" experts. This is significant because previously, parties were able to conceal "relevant but adverse information through the mental gymnastic of deciding that [the expert] did not rely on it."¹⁴⁸ Because the experts' reliance is no longer the relevant criterion in determining whether information reviewed by them is discoverable, the 1993 Amendments have significantly expanded both the types of information that a party may obtain from the opposing party and the ways in which it may be obtained.

As further evidence that a clear rule mandating discovery does not exist, one need only look to the text of Rule 26(b). The same wording in this section that created confusion prior to the 1993 Amendments still exists in the current rule, and no other portion of the text of Rule 26 solves the problem. Rule 26(b)(3) still

144. See *supra* notes 106-43 and accompanying text.

145. 168 F.R.D. 633 (N.D. Ind. 1996).

146. Plunkett, *supra* note 12, at 476; see also *Barna v. United States*, No. 95C6552, 1997 WL 417847, at *2 (N.D. Ill. July 28, 1997) (finding that an interpretation that the Advisory Committee Notes only requires the disclosure of fact work product materials "renders the 1993 amendments to Rule 26(a)(2) superfluous").

147. See Plunkett, *supra* note 12, at 476.

148. Joseph, *supra* note 13, at 103-04.

begins: "Subject to the provisions of subdivision (b)(4) of this rule,"¹⁴⁹ without stating whether the entire paragraph or only the first sentence is subject to (b)(4).

The most logical construction of this wording is the one adopted by the court in *Haworth*,¹⁵⁰ in which the court stated that "the drafters intended the terms 'subject to' to mean that subdivision (b)(3) applies unless there is a standard to the contrary in subdivision (b)(4)."¹⁵¹ Upon determining that subsection (b)(4) does not contain a standard for core work product different from the one contained in subsection (b)(3), the court "conclude[d] that the protection accorded an attorney's mental impressions and opinions by the Supreme Court in *Hickman v. Taylor*,^{152]} . . . and substantially codified in 1970 in Rule 26(b)(3), was intended to apply to discovery from experts."¹⁵³

Any other reading of Rule 26(b) raises possible conflicts with the Rules Enabling Act (the "Act").¹⁵⁴ Under the Act, any rule that modifies or abolishes an evidentiary privilege is invalid.¹⁵⁵ Although the applicable provision of the Act has never been construed in a published opinion, it may invalidate any federal rule that mandates waiver of the work product privilege.¹⁵⁶ If the strong protection afforded core work product is found to be an evidentiary privilege within the meaning of the Act, and if a federal rule mandating disclosure of core work product materials when they are shared with an expert is found to modify that privilege, then that federal rule would be invalid.¹⁵⁷ Therefore, any interpretation other than that adopted by the court in *Haworth* might render the applicable portion of Rule 26(b) invalid.

In addition to the fact that the text of Rule 26 does not create a clear rule mandating discovery, the wording of Rule 26(a)(2) does not express the drafters' intent that work product materials be disclosed.¹⁵⁸ One commentator has argued that "[i]f Congress had intended the information considered by an expert witness similarly to retain any privilege or protection, it could have specifically provided those protections despite Rule 26(a)'s disclosure requirements."¹⁵⁹ In support, the commentator cites another portion of the rule in which there is a specific provision protecting data from disclosure: "Rule 26(a)(1)(C) requires the disclosure of documents or other materials used in making damage calculations, but specifically protects from disclosure materials that are privileged or

149. FED. R. CIV. P. 26(b)(3).

150. *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289 (W.D. Mich. 1995).

151. *Id.* at 293.

152. 329 U.S. 495 (1947).

153. *Haworth, Inc.*, 162 F.R.D. at 294.

154. 28 U.S.C. § 2074(b) (1994).

155. The Rules Enabling Act provides that "[a]ny such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." *Id.*

156. See Joseph, *supra* note 13, at 106.

157. See *id.* at 106 & n.18.

158. See Plunkett, *supra* note 12, at 477.

159. *Id.*

protected.”¹⁶⁰ Consequently, the drafters’ choice not to explicitly protect opinion work product materials provided to experts “suggests further that disclosure under Rule 26(a)(2) requires disclosure of attorney work product given to an expert.”¹⁶¹ However, applying this same logic, if Congress had intended to mandate disclosure despite privilege, it could have specifically provided for that result, which it clearly did not. In light of *Hickman* and the strong protection afforded an attorney’s work product, it is difficult to imagine that the new rules were intended to supersede Supreme Court jurisprudence by inference or speculation.¹⁶²

The wording of Rule 26(a)(2)(B) itself suggests that mental impressions were not intended to fall within the Rule’s disclosure requirements. Rule 26(a)(2)(B) requires the disclosure of “data or other information considered by the [expert] in forming the opinions”¹⁶³ Mental impressions do not logically fit within this description. “‘Data’ and ‘information’ connote subjects that are factual in nature, not ephemera like ‘mental impressions, conclusions, opinions or legal theories’ of the sort protected by Rule 26(b)(3).”¹⁶⁴ As such, the text of Rule 26(a)(2)(B) does not require that the expert report disclose counsel’s opinion work product materials.

Nor do the Advisory Committee Notes to Rule 26(a) indicate that the amended rule was meant to mandate discovery of core work product materials provided to experts.¹⁶⁵ The Advisory Committee’s comments regarding disclosure simply state that attorneys should no longer be able to argue that materials containing fact work product are protected from discovery.

Also, it has been argued that a “reading of the Rule and the Comment as requiring only the disclosure of facts renders the Comment meaningless, because the work product doctrine protects only an attorney’s recording of facts, not the facts themselves.”¹⁶⁶ However, amended Rule 26(a) protects only materials containing an attorney’s mental impressions. Any materials containing fact work product, as well as the facts themselves, are discoverable under the new rule. Even though opinion work product is still protected, the comment is not meaningless because it clarifies that the materials containing the discoverable facts are also now discoverable.

Subsection (b)(3), as written, protects documents and tangible things (which are a method of transmittal) prepared in anticipation of litigation, while

160. *Id.*

161. *Id.*

162. *See* *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 295 (W.D. Mich. 1995).

163. FED. R. CIV. P. 26(a)(2)(B).

164. Joseph, *supra* note 13, at 104 (citing *Haworth, Inc.*, 162 F.R.D. at 289).

165. The Advisory Committee Notes to the 1993 Amendments for FED. R. CIV. P. 26 state: Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

166. Plunkett, *supra* note 12, at 479.

subsection (a)(2)(B) permits discovery of data and other information considered by the expert without specifying what methods of transmittal/forms of communication are contemplated.¹⁶⁷ The question then becomes, is just the data discoverable, or are the communications transmitting the data also discoverable?¹⁶⁸ The comment's function is to answer this question by clarifying that the materials given to the expert that communicate the factual information, not just the factual information itself, are discoverable. Although the comment certainly is not worthless under this interpretation, its significance ends at clarifying that the facts *and* the factual materials are discoverable. It does not indicate that the rule is intended to override the work product privilege in cases where opinion work product materials are shared with experts.

Amended Rule 26 and its comments do not create a clear rule mandating discovery of opinion work product materials provided to testifying experts. Against the historical backdrop of the judicial debate on the issue, the drafters of the rule would have created a clear rule mandating disclosure of such core work product had they intended to override the strong protection afforded such materials by the U.S. Supreme Court.

B. The Supreme Court's Protectionist Approach

The Supreme Court clearly announced its desire to protect attorney work product in *Hickman v. Taylor*¹⁶⁹ and has not expressed a contrary desire since. Given that the text of Rule 26 does not create a clear rule regarding discovery of opinion work product materials provided to testifying experts, any ambiguity on the face of the rule should be resolved in favor of existing Supreme Court jurisprudence. The Court clearly announced in *Hickman* that an attorney's opinion work product is deserving of nearly absolute protection.¹⁷⁰ Twenty-six years later, the Supreme Court reiterated that rule in *Upjohn Co. v. United States*.¹⁷¹ In writing for a unanimous Court, Justice Rehnquist emphasized that "Rule 26 accords special protection to work product revealing the attorney's

167. FED. R. CIV. P. 26.

168. See Joseph, *supra* note 13, at 103.

It is revealing that the Advisory committee Note is phrased in terms of "materials," even though subdivision (a)(2)(B) is not expressly limited to "documents and tangible things," as is subdivision (b)(3), but speaks only generally, in terms of "data or other information" (a phrase that describes the type of subject matter transmitted, regardless of the method of transmittal). The Advisory Committee's reference to "materials"—together with its reference to what "litigants should no longer be able to argue"—suggests that the drafters' intent was to resolve the prior squabbling over the discoverability of the factual matter furnished by counsel to a testifying expert to permit the expert to form an opinion.

Id.

169. 329 U.S. 495 (1947).

170. See *supra* notes 14-23 and accompanying text.

171. 449 U.S. 383, 400 (1981).

mental processes.”¹⁷² The Supreme Court has not spoken on the issue since *Upjohn*. As noted by the court in *Haworth*, in the absence of a Supreme Court opinion to the contrary, “[f]or the high privilege accorded attorney opinion work product not to apply would require clear and unambiguous language in a statute. No such language appears [in Rule 26].”¹⁷³

C. Experts as Part of the Litigation Team

Expert witnesses and counsel need to engage in uninhibited exchanges. Allowing the opposing party to discover opinion work product communicated within those exchanges would, in effect, allow the parties to use the discovery rules to uncover the opposing party’s litigation strategies. Unlike other types of trial witnesses, experts are part of a party’s litigation team who, like the attorney, are employed expressly for the purpose of analyzing the strengths and weaknesses of a party’s case. “Communications between counsel and expert are often essential to the understanding and proper functioning of both, and are therefore crucial to the prosecution or defense of a case.”¹⁷⁴ These types of strategic communications include analysis of “(i) the strengths and weaknesses of claims and defenses, whether asserted or unasserted; (ii) esoterica in the expert’s field, often but not necessarily relating either to [the] expert’s own, or to another expert’s, actual or prospective opinion in the case; and (iii) damages issues.”¹⁷⁵ Given this mutual need to freely exchange ideas, expert witnesses should be treated similarly to other members of a party’s litigation team, such as individual plaintiffs or defendants, who may testify at trial without having to disclose their litigation strategy or information that their attorney may have disclosed to them.

Experts are not impartial witnesses. Like attorneys, they are paid to advocate a point of view. In order to fulfill this purpose, they may have a legitimate need to share in uninhibited exchanges with other members of the litigation team without fear of having to disclose strategy to the other party. The mere fact that an attorney chooses to use an expert at trial indicates that the expert’s opinion is favorable to her client’s case.¹⁷⁶ Viewed in this light, allowing the opposing party to automatically discover all of the materials provided to the expert, including those containing the attorney’s mental impressions and theories, would amount to a windfall to the opposing party. Certainly, the Federal Rules of Civil Procedure were not intended to either deprive counsel of the benefits of freely communicating with an expert witness, or to act as a vehicle through which a party is able to freely discover the opposing counsel’s strategy.

172. *Id.*

173. *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 295 (W.D. Mich. 1995) (citation omitted).

174. Joseph, *supra* note 13, at 101.

175. *Id.*

176. See Ronald J. Allen et al., *A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine*, 19 J. LEGAL STUD. 359, 390 (1990); Mickus, *supra* note 10, at 784.

D. Cross-examination

Contrary to the views expressed in many of the post-1993 discovery-oriented opinions,¹⁷⁷ disclosure of opinion work product materials provided to testifying experts is not required for effective cross-examination because the experts' opinions must ultimately have their basis in fact, not in attorneys' mental impressions.¹⁷⁸ Because such facts are discoverable, the opposing party has access to the information on which the experts' opinions are based, resulting in effective cross-examination. The opposing party also may counter expert testimony with experts of its own giving opinions based on the same facts. An expert whose opinions are shown not to have a strong basis in fact will not have credibility with the jury. Lack of factual foundation for an opinion is likely to have a more profound impeaching effect with the jury than the simple knowledge that the attorney shared her opinions with the expert.

Proponents of discovery argue that "[t]he cross-examiner cannot effectively pin an expert down on the extent to which counsel's presentation of the factual background or overt suggestions have shaded the expert's testimony unless the cross-examiner has some idea of what was presented or suggested to the expert."¹⁷⁹ However, this argument is inaccurate. If an expert's opinion is sound given the facts of the case which are equally available to both parties, opinion work product presented to the expert is essentially immaterial. A factually sound opinion is no less sound simply because the attorney agrees. If the expert's opinion is not sound, then he may be impeached on the facts of the case rather than on opinion work product that he may have seen.

E. Integrity of the Truth-finding Process

Many courts that have adopted a discovery-oriented approach have based their holdings, at least in part, on the principle announced in *Intermedics, Inc. v. Ventritex, Inc.*¹⁸⁰ that disclosure of opinion work product materials provided to experts is required to protect the integrity of the truth-finding process. This is not the case. Experts are not occurrence witnesses who merely describe factual information underlying the dispute. Protecting work product materials disclosed to experts will not affect the ability of the trier of fact to gain an accurate

177. See *supra* notes 109-29 and accompanying text.

178. See, e.g., *Hamel v. General Motors Corp.*, 128 F.R.D. 281, 283 (D. Kan. 1989); *North Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 108 F.R.D. 283, 285-86 (M.D.N.C. 1985); Bryan Lewis, Note, *Discovery Under the Federal Rules of Civil Procedure of Attorney Opinion Work Product Provided to an Expert Witness*, 53 *FORDHAM L. REV.* 1159, 1172-73 (1985); Katherine A. Staton, Note, *Discovery of Attorney Work Product Reviewed by an Expert Witness*, 85 *COLUM. L. REV.* 812, 827-28 (1985).

179. Mickus, *supra* note 10, at 790-91; see also Jack H. Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 *STAN. L. REV.* 455, 485 (1962).

180. 139 F.R.D. 384, 394 (N.D. Cal. 1991). See also *supra* notes 66-79 and accompanying text.

understanding of the events giving rise to the lawsuit or to judge the credibility of the evidence presented.

The truth-finding process will be better served by a rule that allows counsel to most effectively and efficiently develop litigation strategies and prepare their case for trial without fear of essentially handing that strategy over to the other party.¹⁸¹ In fact, protecting work product materials furnished to testifying experts furthers the search for truth by “[p]reserving the privacy of preparation that is essential to the attorney’s adversary role”¹⁸² and by creating incentives to encourage counsel to creatively explore all possible theories of a case. It is important to recognize that

counsel does not know when she begins to prepare a new legal theory of the case, or to develop its factual basis, whether the process will produce insights more helpful to the other side than to her own. If counsel does not know, prior to undertaking the development of a new legal theory or factual investigation, whether the end result will prove helpful or harmful to her client’s case, then the possibility that the opposing party could discover the lawyer’s work would constitute a substantial disincentive for proceeding with the development of the new theory or factual investigation.

. . . Removing this disincentive to creative legal thought therefore stimulates the truth-finding process by unleashing each lawyer’s analytic abilities in the preparation of her client’s case, so that the finder of fact is presented with a choice between two well-developed positions, each portrayed in the best possible light.¹⁸³

Providing absolute protection to counsel’s core work product provides the necessary incentives to encourage counsel to most creatively and effectively plan the client’s litigation strategy, and actually furthers the integrity of the truth-finding process rather than hindering it.

Additionally, protecting core work product materials shared with experts “has the added benefits of (1) not favoring wealthy parties who can afford to hire both testifying and non-testifying experts and (2) not encouraging counsel and experts to engage in coy or strained conversations cloaked as ‘hypothetical’ to avoid discovery.”¹⁸⁴ Both of these benefits aid in the truth-finding process by not disadvantaging parties who are not well-financed and by permitting counsel and experts to engage in frank, straightforward discussions regarding the litigation.

Also, limiting discovery of opinion work product materials provided to experts does not affect the opposing party’s ability to determine the facts of a case or to prepare its best case for trial. Protecting opinion work product materials provided to testifying experts does not allow parties to circumvent the

181. See *Hickman v. Taylor*, 329 U.S. 495 (1947).

182. *Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir. 1985).

183. Mickus, *supra* note 10, at 781-82.

184. Joseph, *supra* note 13, at 90 (citing *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289 (W. D. Mich. 1995)).

mandates of Rule 26(a)(2) and thus avoid revealing the basis for the expert's opinion. It has been argued that "allowing the work product protection to continue in materials used to prepare an expert to give testimony would yield the perverse incentive of encouraging counsel to use only work product materials to prepare an expert to give testimony, in order to avoid disclosure to the opposing party."¹⁸⁵ However, such a result is unlikely. Because fact work product materials are discoverable, the factual basis for the expert's opinion would be discoverable in all circumstances; and because the expert's opinion must ultimately be rooted in fact, parties must provide experts with factual materials so that they may first develop an informed opinion, and then intelligently and convincingly testify to the basis for that opinion at trial.

Proponents of discovery also suggest that the employment nature of the attorney/expert relationship encourages experts to alter their opinions to satisfy the attorneys who have hired them. Because the nature of the attorney/expert relationship is similar to an employer/employee relationship, and because many experts today are professional witnesses whose income depends on the production of favorable testimony, it is argued that there is pressure on experts "to conceal doubt, to overstate nuance, to downplay weak aspects of the case that one has been hired to bolster,' and to otherwise bring his opinion in line with the lawyer's view of what the expert's opinion ought to be. . . ."¹⁸⁶ But this is not a valid argument for disclosure of core work product materials. There is a risk that any and all types of testimony will be influenced by one of the parties. However, that risk cannot be eliminated and certainly does not justify disclosure of core work product. The job of the trier of fact is to judge the credibility of witnesses, and they are able to do so without compromising an attorney's right to protect his work.

In fact, the ongoing employment nature of the expert-attorney relationship is precisely the thing that encourages attorneys and experts *not* to taint the expert's testimony. Expert witnesses have less incentive than other types of witnesses to shape their testimony in response to influence of counsel because their continued income depends upon their credibility. Professional experts who express inconsistent opinions from one trial to the next are no longer desirable experts for future litigation. Attorneys also share in this interest to preserve the integrity of expert testimony because they often build an ongoing relationship with experts. If the attorney unduly influences the expert's testimony and the expert testifies to opinions that are not firmly rooted in fact, then the expert becomes less credible and consequently is a less desirable witness in the future.

CONCLUSION

For all of these reasons, a protection-oriented approach would better serve the interests of justice than a rule allowing for disclosure of core work product.

185. Mickus, *supra* note 10, at 787 (footnote omitted).

186. *Id.* at 789 (quoting John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 835 (1985)).

The truth-finding process would be better advanced by a rule that would allow the attorney and the expert to engage in free, creative discussions without requiring that they then turn over the fruits of those discussions to the opposing party. A protection-oriented rule would allow attorneys to freely develop their best case for trial without fear of disclosing litigation strategy.

The confusion surrounding the mandates of Rule 26 forces parties to gamble with their most precious and creative ideas and strategies. The risks are potentially devastating. Because work product materials provided to testifying experts should not be discoverable under Federal Rule of Civil Procedure 26, the rule should be amended to clarify that 26(b)(3) work product protection extends to opinion work product materials provided to testifying experts.

COVENANT MARRIAGE: LEGISLATING FAMILY VALUES

AMY L. STEWART*

INTRODUCTION

Hardly a social problem exists that has not been attributed to the breakdown of the American family, and hardly has there been a time in American history when this has not been true. Today, a decline in “family values” is blamed for crime, drug use, low educational achievement, poverty, and probably in some circles, for the weather. The solution to these problems, the theory goes, is to save the family, and the way to save the family is to make it harder to get divorced.

In some states, conservative lawmakers are charging to the rescue. They propose a concept called “covenant marriage,” a sort of “marriage deluxe” that would be slightly harder to enter and much harder to exit than a “regular” marriage. Their goal is to reduce the divorce rate by preventing bad marriages before they begin and by restricting divorce once a couple is married. In July 1997, Louisiana became the first state to pass a covenant marriage bill.¹ This Note assesses the likely effectiveness of such a measure. It concludes that marriages are better made in the human heart than in the statehouse halls.

Part I of this Note reviews the evolution of American divorce law to provide an historical context for the current movement to reform those laws. As one product of this new reform movement, the covenant marriage proposal itself is described in detail. In an effort to evaluate whether new restrictions on divorce will improve social conditions, the current, less restrictive scheme of no-fault divorce is analyzed to determine whether it has been responsible for adverse social consequences. Specifically, this Note considers the impact of no-fault divorce laws on the well-being of children and spouses, on the post-divorce finances of women, and on the divorce rate. A brief attempt is made to explore the factors that contribute to successful marriages. Against this backdrop, covenant marriage legislation is inspected to determine whether it will succeed in achieving its social objectives. Finally, this Note recommends alternative approaches.

I. HISTORY AND EVOLUTION OF DIVORCE LAW

During the Colonial period of American history, the family was an integral part of a hierarchically organized, interdependent society, and the family owed duties and obligations to the community.² In order for men to fulfill their duty to maintain a well-governed home, they were vested with control over the

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1. Act of July 15, 1997, 1997 La. Acts 1380 (codified at LA. REV. STAT. ANN. §§ 9:224-25, 234, 245, 272-75, 307-09 (West Supp. 1998)).

2. See MICHAEL GROSSBERG, GOVERNING THE HEARTH 4 (1985).

household's inhabitants and property.³ Women and children were subordinate and dependent.⁴ Under the law, husbands and wives were treated as one person, and the husband assumed all of the wife's legal rights.⁵ Divorce, where available, required an act of the legislature, and even divorce from bed and board (a form of legal separation) was rare.⁶ This does not mean, however, that marriages always remained intact. The most common solutions to marital breakdown were adultery and desertion.⁷

Unlike the Old World, however, America offered abundant land, commercial opportunities, and demographic patterns which began to effect changes in the concept of family.⁸ Individuals resisted community and family demands that restricted their personal choices.⁹ Women gained more social and economic freedom¹⁰ and their legal rights increased, as represented by the availability of divorce in some colonies.¹¹

In the Post-Revolutionary era, the family evolved from a public to a private institution.¹² The law began to regard the family as a separate, self-regulating body composed of individuals with their own rights and identities.¹³ Affection, not status, became the basis for marriage,¹⁴ which was viewed as contractual in nature, arising from the consent of both parties and capable of being dissolved.¹⁵ Gender roles within the family became specialized; husbands were responsible for supporting the family, wives for maintaining the home.¹⁶

Reflecting the more emotional and intimate nature of marriage, the Nineteenth Century brought a steady rise in the number of divorces, increasing at a rate of more than seventy percent per year by the end of the century.¹⁷ In 1867, 9937 divorces were granted in the United States; by 1900, 55,000 couples divorced each year.¹⁸ Restrictive divorce laws failed to stem the tide.¹⁹ Reformers spoke of a "crisis in the family," and "critics warned that divorce and desertion, male licentiousness, and women's rights threatened the very fabric of the republic. . . . An overemphasis on personal welfare and private satisfaction

3. *See id.* at 5.

4. *See id.*

5. *See id.* at 25.

6. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 204-05 (1985).

7. *See id.* at 204.

8. *See* GROSSBERG, *supra* note 2, at 5.

9. *See id.* at 5-6.

10. *See id.* at 5.

11. *See id.* at 25.

12. *See id.* at 6.

13. *See id.* at 26.

14. *See id.* at 7.

15. *See id.* at 6-7, 19-20.

16. *See id.* at 7-9.

17. *See id.* at 238, 250-51.

18. *See* FRIEDMAN, *supra* note 6, at 500.

19. *See* GROSSBERG, *supra* note 2, at 250.

was, they held, a menace to social cohesion because it fostered excessive individualism and self-indulgence.”²⁰

During the period between the Revolution and the end of the Nineteenth Century, courtroom divorce gradually replaced legislative divorce, first in the northern states and later in the South.²¹ Under the new laws, divorce was an adversarial process in which one spouse had to prove that the other was at fault, usually for adultery, desertion, cruelty, or drunkenness.²² Over two-thirds of all divorce actions were filed by wives.²³

Although the divorce statutes were strict, between the mid-Nineteenth and mid-Twentieth Centuries, the law and practice of divorce diverged.²⁴ Couples managed to obtain “consensual” divorces, although the statutes allowed no such thing.²⁵ The primary mechanisms of consensual divorce were collusion and perjury.²⁶ In New York, for example, where adultery was the only allowable ground for divorce, “divorce rings” flourished.²⁷ Enterprising entrepreneurs manufactured adultery for couples in the market for divorce by staging compromising hotel room scenes, complete with “actresses” who would appear in court and “testify they knew the husband in the case, blush, cry, and then leave the rest to the judge.”²⁸ In states that allowed more relaxed grounds for divorce, such as abandonment and cruelty, these were by far the most popular grounds, and most of these divorces were uncontested.²⁹ By 1959, cruelty was the ground in half of this country’s divorces, and desertion accounted for another twenty-five percent.³⁰ Still another option was to travel to “divorce mills”—states popular among freedom-seeking visitors for their permissive divorce laws.³¹

In 1969, California enacted the nation’s first no-fault divorce law, recognizing divorce as the result of factual marital breakdown.³² California’s new no-fault ground for divorce was “irreconcilable differences, which have caused the irremediable breakdown of the marriage.”³³ The first version of the Uniform Marriage and Divorce Act, promulgated in 1970, also provided for no-

20. *Id.* at 10-11.

21. *See* FRIEDMAN, *supra* note 6, at 205-06.

22. *See* GROSSBERG, *supra* note 2, at 251.

23. *See id.*

24. *See* Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 659 (1984).

25. *See id.* at 653, 659.

26. *See id.* at 659.

27. *Id.* at 659-60.

28. *Id.* at 659.

29. *See id.* at 660-61.

30. *See id.* at 661.

31. *See id.*

32. Family Law Act, ch. 1608, § 8, 1969 Cal. Stat. 3314 (codified as amended in scattered sections of CAL. FAM. CODE).

33. Family Law Act, ch. 1608, § 8, 1969 Cal. Stat. 3324 (codified as amended at CAL. FAM. CODE § 2310 (West 1994)).

fault divorce.³⁴ By 1985, all fifty states had enacted some form of no-fault divorce laws.³⁵ The primary goal of these laws was to eliminate a showing of fault as a requirement for divorce, thereby reducing the adversarial practices that fault had fostered.³⁶ Other purposes for abolishing fault grounds included eliminating collusion and perjury—which compromised the integrity of the legal system—closing the gap between the law as written and the law as applied, and reflecting changes in conceptions of marital breakdown.³⁷ No-fault divorce laws were passed, not to change divorce radically, but to bring the law into step with current practice.³⁸

II. THE “NEW” DIVORCE REFORM MOVEMENT

Divorce law critics loudly and frequently attack the grounds for divorce. Widespread dissatisfaction with the accomplishments of divorce law and with divorce policy form the context of this criticism. It is asserted by many that divorces are far too numerous in our society, that they undermine the foundations of family life, that they generate instability throughout society, and that they leave an ever-increasing proportion of American children without the security and affection of a united family, thereby producing juvenile delinquency, truancy, and a variety of psychological ills.³⁹

These words could have been plucked from the pages of a current periodical. Instead, they were written in 1971 and describe the deep discontent that then existed regarding the country’s fault-based divorce laws and high rate of divorce.⁴⁰ The legal reforms born of this discontent resulted in the current system of no-fault divorce.

34. UNIF. MARRIAGE AND DIVORCE ACT §303 (amended 1973), 9A U.L.A. 147 (1987).

35. See Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 54 (1987). See, e.g., ALA. CODE § 30-2-1 (1989); CONN. GEN. STAT. ANN. § 46b-40 (West 1995); GA. CODE ANN. § 19-5-3 (1991); IDAHO CODE §§ 32-603, 32-616 (1996); IND. CODE ANN. § 31-15-2-3 (West Supp. 1998); IOWA CODE ANN. § 598.17 (West 1996 & Supp. 1998); ME. REV. STAT. ANN. tit. 19-A, § 902 (West 1998); MASS. GEN. LAWS ANN. ch. 208, §§ 1A, 1B (West 1998); MICH. COMP. LAWS ANN. § 552.6 (West 1988); MINN. STAT. ANN. § 518.06 (West 1990); MISS. CODE ANN. § 93-5-2 (1994 & Supp. 1998); N.H. REV. STAT. ANN. § 458:7-a (1992); N.D. CENT. CODE § 14-05-03, 14-05-09.1 (1997); OHIO REV. CODE ANN. § 3105.01 (Anderson 1996); OR. REV. STAT. § 107.025 (1996); 23 PA. CONS. STAT. ANN. § 3301 (West 1991); R.I. GEN. LAWS § 15-5-3.1 (1996); S.D. CODIFIED LAWS § 25-4-2 (Michie 1992).

36. See Kay, *supra* note 35, at 4-5, 46.

37. See Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. REV. 79, 93-96 (1991).

38. See *id.* at 97.

39. Homer H. Clark, Jr., *Divorce Policy and Divorce Reform*, 42 U. COLO. L. REV. 403, 403 (1971).

40. *Id.*

Today, a new movement is underway to reduce the number of divorces. In this movement, no-fault divorce is the culprit. Modern reformists are fueling a backlash against no-fault divorce and spawning proposals to toughen states' divorce laws.⁴¹

Proponents of restrictive divorce laws blame no-fault divorce primarily for three conditions: the availability of "unilateral" divorce, the rise in the divorce rates, and the high social costs exacted by divorce. First, they object to the practice of unilateral divorce (divorce at the request of one spouse, without the consent of the other), which they equate with no-fault divorce.⁴² In fact, unilateral no-fault divorce is not available in some states.⁴³ Even so, this criticism is curious. Fault-based divorce laws, to which the critics of no-fault divorce seek to return, did not permit consensual divorce.⁴⁴ Rather, the statutes provided for unilateral divorce *only*, with an innocent spouse obtaining a divorce from a guilty spouse.⁴⁵ "The mere mention of permitting divorce by consent evoke[d] strong resistance, not only from adherents of the traditional notions that divorce should be awarded to the innocent spouse alone, but also from the reformers."⁴⁶ Couples desiring a consensual divorce, but lacking any of the necessary grounds, contrived to circumvent the laws and manufacture grounds.⁴⁷ In a confused twist of logic, today's reformists, who would permit divorce only by mutual consent (if then), and who loathe the concept of unilateral divorce, are seeking to return to a system where unilateral divorce was the only sanctioned course.

A more basic question is whether unilateral divorce is improper at all.

Even in those statistically rare cases in which one party seeks a divorce and the other resists, it is difficult to see what evidence a court could rely upon to hold that the marriage had not broken down. Marriage is a relationship between two people, and if one of those people is

41. See, e.g., MAGGIE GALLAGHER, *THE ABOLITION OF MARRIAGE* (1996); Charles S. Clark, *Is It Time to Crack Down on Easy Divorces?*, 6 CQ RESEARCHER 409 (1996); William A. Galston, *Braking Divorce*, AM. ENTERPRISE, May/June 1996, at 36; Laura Gatland, *Putting the Blame on No-Fault*, A.B.A. J., April 1997, at 50; Herma Hill Kay, 'Family Values' Embrace Fault in Divorce, NAT'L L.J., May 1, 1995, at A21; Wardle, *supra* note 37.

42. See Wardle, *supra* note 37, at 107.

43. See ALASKA STAT. § 25.24.200 (Michie 1996); ARIZ. REV. STAT. ANN. § 25-316 (West 1991); COLO. REV. STAT. ANN. § 14-10-110 (West 1997); CONN. GEN. STAT. ANN. § 46b-51 (West 1995); HAW. REV. STAT. ANN. § 580-42 (Michie 1997); 750 ILL. COMP. STAT. ANN. 5/401 (West 1993); MISS. CODE ANN. § 93-5-2 (1994); MO. ANN. STAT. § 452.320 (West 1997); OHIO REV. CODE ANN. § 3105.01 (Anderson 1996); 23 PA. CONS. STAT. ANN. § 3301 (West 1991); TENN. CODE ANN. § 36-4-103 (1996); WASH. REV. CODE § 26.09.030 (West 1997); W. VA. CODE § 48-2-4 (1996); WIS. STAT. § 767.12 (1993).

44. See Friedman, *supra* note 24, at 653.

45. See Kay, *supra* note 35, at 28.

46. Clark, *supra* note 39, at 407.

47. See Friedman, *supra* note 24, at 659.

determined that it shall not continue, this would seem to be plain evidence that the relationship had broken down.⁴⁸

Another argument against prohibiting unilateral divorce is the principle that no marriage should be maintained without the consent of both spouses, just as no marriage can be created without the consent of both bride and groom.⁴⁹

The other two major conditions for which critics blame the current divorce laws are that the laws have caused an increase in the divorce rate and that the laws have resulted in unacceptably high social costs. Reformers urge that divorce must be made more difficult because of the sizable costs that it exacts, financially and psychologically, on women and children.⁵⁰ Each of these concerns is addressed in detail in later sections of this Note.⁵¹

III. COVENANT MARRIAGE

Proposals to reform no-fault divorce laws have been introduced in a majority of states.⁵² One version of these proposals is the "covenant marriage." Covenant marriage legislation is intended to counteract no-fault divorce's perceived effect on the divorce rate and on children by allowing couples to choose a stricter form of marriage.⁵³ Some variety of covenant marriage legislation has been considered

48. Clark, *supra* note 39, at 406.

49. See Joseph Goldstein & Max Gitter, *On Abolition of Grounds for Divorce: A Model Statute & Commentary*, 3 FAM. L.Q. 75, 86 (1968).

50. See, e.g., Wardle, *supra* note 37, at 113-16.

51. See *infra* Part IV.

52. See, e.g., H.R. 1179, 61st Gen. Assembly, 1st Reg. Sess. (Colo. 1997); H.B. 249, 144th Gen. Assembly, 1997-98 Reg. Sess. (Ga. 1997); H.B. 2839, 77th Leg., 1998 Reg. Sess. (Kan. 1998); H.B. 1168, 181st Gen. Ct., 1997 Reg. Sess. (Mass. 1997); H.B. 5991, 89th Leg., 1997 Reg. Sess. (Mich. 1997); H.B. 573, 55th Reg. Sess. (Mont. 1997); A.B. 2547, 207th Leg., 1st Ann. Sess. (N.J. 1996); S. 1182, 43d Leg., 1st Reg. Sess. (N.M. 1997); H.B. 2208, 46th Leg. Sess., 2d Sess. (Okla. 1997); S.B. 1122, 69th Leg. Assembly, Reg. Sess. (Or. 1997); S.B. 840, 181st Gen. Assembly, 1997-98 Reg. Sess. (Pa. 1997); H.B. 1697, 100th Gen. Assembly (Tenn. 1997); S. 120, 52d Leg. (Utah 1997); H.B. 472, 65th Sess. (Vt. 1997); H.B. 1056, 1998 Sess. (Va. 1998). See also *infra* notes 54-74 (citing state legislation regarding covenant marriage).

53. See, e.g., *Hearing on House Bill No. 756 Before the Civil Law and Procedure Committee*, 1997 Reg. Sess. (La. 1997) [hereinafter *Hearing*]; Catherine Candisky, *Lawmakers Propose Vows to Tie Knot a Little Tighter*, COLUMBUS DISPATCH, Aug. 22, 1997, at 4C; Sara Shipley, *Marriage Bill Weakened by Senate Panel: No-Fault Divorce OK with 3-Year Separation*, NEW ORLEANS TIMES-PICAYUNE, June 11, 1997, at A6.

in twenty states (Alabama,⁵⁴ Alaska,⁵⁵ Arizona,⁵⁶ California,⁵⁷ Georgia,⁵⁸ Indiana,⁵⁹ Kansas,⁶⁰ Louisiana,⁶¹ Michigan,⁶² Minnesota,⁶³ Mississippi,⁶⁴ Missouri,⁶⁵ Nebraska,⁶⁶ Ohio,⁶⁷ Oklahoma,⁶⁸ South Carolina,⁶⁹ Tennessee,⁷⁰ Virginia,⁷¹ Washington,⁷² and West Virginia⁷³). In July 1997, Louisiana became the first state to allow couples to opt for a covenant marriage.⁷⁴

The Louisiana law requires couples who choose a covenant marriage to undergo premarital counseling and to include a declaration of their intent to enter into a covenant marriage with their application for a marriage license.⁷⁵ The bases for dissolving a covenant marriage mirror fault-based grounds for divorce. Under a covenant marriage, a "non-breaching" spouse may be granted a divorce only if the other spouse has committed one of the following specific acts: (1)

54. H.B. 44, 1998 Reg. Sess. (Ala. 1998); H.B. 30, 1998 Reg. Sess. (Ala. 1998); S.B. 606, 1998 Reg. Sess. (Ala. 1998).

55. H.B. 390, 20th Leg., 2d Sess. (Alaska 1997); S.B. 318, 20th Leg., 2d Sess. (Alaska 1997).

56. H.B. 2658, 43d Leg., 2d Reg. Sess. (Ariz. 1998); S.B. 1133, 43d Leg., 2d Reg. Sess. (Ariz. 1998).

57. S.B. 2, 1997-98 Reg. Sess. (Cal. 1997); S.B. 1377, 1997-98 Reg. Sess. (Cal. 1997).

58. H.B. 1138, 144th Gen. Assembly, 1997-98 Reg. Sess. (Ga. 1997); S.B. 440, 144th Gen. Assembly, 1997-98 Reg. Sess. (Ga. 1997).

59. H.B. 1049, 110th Gen. Assembly, 1st Reg. Sess. (Ind. 1997); H.B. 1052, 110th Gen. Assembly, 2d Reg. Sess. (Ind. 1998).

60. H.B. 2839, 77th Leg., 1998 Reg. Sess. (Kan. 1997).

61. H.B. 756, 1997 Reg. Sess. (La. 1997).

62. H.B. 5990, 89th Leg., 1998 Reg. Sess. (Mich. 1997); H.B. 5991, 89th Leg., 1998 Reg. Sess. (Mich. 1997).

63. S.F. 2760, 80th Reg. Sess. (Minn. 1997); S.F. 2935, 80th Reg. Sess. (Minn. 1997).

64. H.B. 1201, 1998 Reg. Sess. (Miss. 1998); H.B. 1222, 1998 Reg. Sess. (Miss. 1998); H.B. 1645, 1998 Reg. Sess. (Miss. 1998); S. 2910, 1998 Reg. Sess. (Miss. 1998).

65. H.B. 1864, 89th Gen. Assembly, 2d Reg. Sess. (Mo. 1998).

66. L.B. 1214, 95th Leg., 2d Reg. Sess. (Neb. 1997).

67. H.B. 567, 122d Gen. Assembly, 1997-98 Reg. Sess. (Ohio 1997).

68. H.B. 2208, 46th Leg. Sess., 2d Sess. (Okla. 1997); S.B. 1115, 46th Leg. Sess., 2d Sess. (Okla. 1997).

69. S.B. 870, 112th Gen. Assembly (S.C. 1997); S.B. 961, 112th Gen. Assembly (S.C. 1997).

70. H.B. 2101, 100th Gen. Assembly, 1998 Reg. Sess. (Tenn. 1997).

71. H.B.J. Res. 266, 1998 Sess. (Va. 1998); H.B. 1056, 1998 Sess. (Va. 1998); H.B. 1159, 1998 Sess. (Va. 1998).

72. S.B. 6135, 55th Leg., 1998 Reg. Sess. (Wash. 1997).

73. H.B. 4562, 73d Leg., 2d Reg. Sess. (W. Va. 1998).

74. Act of July 15, 1997, 1997 La. Acts 1380 (codified at LA. REV. STAT. ANN. §§ 9:224-25, 234, 245, 272-75, 307-09 (West Supp. 1998)). Arizona has now become the second state to pass a covenant marriage bill. Act of May 21, 1998, 1998 ARIZ. SESS. LAWS 135.

75. LA. REV. STAT. ANN. §§ 9:272-73 (West Supp. 1998).

adultery; (2) commission of a felony and sentence to death or imprisonment at hard labor; (3) abandonment for at least one year; (4) physical or sexual abuse of the spouse or a child of one of the spouses; or (5) continuous physical separation of at least two years.⁷⁶ Divorce also may be granted following a one-year legal separation if there are no minor children of the marriage or if the ground for the separation was abuse; the minimum separation period is eighteen months if there are minor children.⁷⁷ However, legal separation itself is available only upon a showing of one of the grounds required for divorce or "habitual intemperance of the other spouse, or excesses, cruel treatment, or outrages of the other spouse, if such habitual intemperance, or such ill-treatment is of such a nature as to render their living together insupportable."⁷⁸ Regardless of the ground, couples must undergo counseling before obtaining a divorce or legal separation.⁷⁹

In order to gain passage, the Louisiana law was weakened in several respects during the legislative process. As originally drafted, physical or sexual abuse would not have been grounds for divorce, but only for legal separation.⁸⁰ The grounds for legal separation also were expanded to include habitual intemperance or excesses, cruel treatment, or outrages.⁸¹ The state Attorney General's Office was required to develop a pamphlet for couples, explaining the distinctions between covenant marriage and regular marriage.⁸² Perhaps most significantly, the bill was amended to allow couples to divorce after living apart continuously for two years—essentially no-fault divorce with a waiting period.⁸³

The covenant marriage law in Louisiana, like similar efforts in other states, is the product of a political movement involving conservative Christian groups. The bill's author, State Representative Tony Perkins, holds degrees from the Reverend Jerry Falwell's Liberty University and is a longtime Christian and a member of the Promise Keepers, an evangelical men's movement.⁸⁴ All of those who appeared in support of the bill in a Louisiana House committee and who identified an affiliation with a particular group were members of Christian religious organizations.⁸⁵ Some see the law as legislating Biblical grounds for divorce.⁸⁶ The reaction of Louisiana's religious institutions, therefore, has been

76. See *id.* § 9:307.

77. See *id.*

78. *Id.*

79. See *id.*

80. See H.B. 756, 1997 Reg. Sess. (La. 1997).

81. See Bruce Nolan, *Creating a More Perfect Union? La.'s "Covenant Marriage" Debated*, NEW ORLEANS TIMES-PICAYUNE, June 29, 1997, at A1.

82. See Shipley, *supra* note 53, at A6.

83. See Nolan, *supra* note 81, at A1.

84. See Cheryl Wetzstein, *Legislative Pioneer Credits Power of Prayer: Says He "Reaped Without Sowing,"* WASH. TIMES, Oct. 9, 1997, at A2.

85. See *Hearing*, *supra* note 53.

86. See Kevin Sack, *Louisiana Approves Measure to Tighten Marriage Bonds*, N.Y. TIMES, June 24, 1997, at A1.

quite surprising. Initially, it appeared that Louisiana's churches would encourage, if not require, couples to choose covenant marriage.⁸⁷ Indeed, the state's Southern Baptist churches generally have been supportive.⁸⁸ Catholic, Episcopal, Jewish, and Methodist leaders, however, have been reserved.⁸⁹ Louisiana's Catholic bishops, for example, chose not to endorse covenant marriage because of the requirement that premarital counseling include an explanation of the law's higher standards for divorce, a subject that the Catholic Church will not explore.⁹⁰

Proponents of covenant marriage stress that their proposals simply provide couples with a choice between "regular" marriage and a more committed form.⁹¹ The practical nature of this choice has yet to be determined. During the debate over the covenant marriage bill in Louisiana, some predicted that real "choice" would be nonexistent. Couples would be shamed into choosing covenant marriage for fear of appearing uncommitted to their mate, or the more restrictive covenant marriages would be chosen in a haze of idealistic premarital bliss.⁹² In fact, few couples have chosen covenant marriages since the law went into effect.⁹³ In the first month in which covenant marriage licenses were available, only twenty-six covenant marriage licenses were issued, out of approximately 3000 total marriage licenses.⁹⁴ The discussion of choice, however, avoids the obvious: Couples have choice without covenant marriage legislation. Couples already may, and do, make choices about their level of commitment to their marriages, just as couples make choices about having children or buying a home. No authorizing statute is required.

87. See Nolan, *supra* note 81, at A6.

88. See Janet McConnaughey, *Covenant Marriages Slow-Going in State*, NEW ORLEANS TIMES-PICAYUNE, Oct. 19, 1997, at A4; Bruce Nolan, *Bishops Back Off Covenant Marriage*, NEW ORLEANS TIMES-PICAYUNE, Oct. 30, 1997, at A1 [hereinafter *Bishops Back Off Covenant Marriage*]; Nolan, *supra* note 81, at A1.

89. See *Bishops Back Off Covenant Marriage*, *supra* note 88, at A1.

90. See *id.*

91. See, e.g., Amitai Etzioni, *Marriage With No Easy Outs*, N.Y. TIMES, Aug. 13, 1997, at A23.

92. See, e.g., Margaret Carlson, *Till Depositions Do Us Part*, TIME, July 7, 1997, at 21; Nolan, *supra* note 81, at A1; Editorial, *Cracking Down on Divorces*, TULSA WORLD, Aug. 23, 1997, at A15.

93. See Julie Kay, *Covenant Couples Few: Only 5 Licenses Obtained in Baton Rouge*, BATON ROUGE ADVOC., Oct. 25, 1997, at 1C; Victoria Loe, *Covenant Marriages Get Mixed Reception: Many Couples Find More-Binding Nuptials Confusing*, DALLAS MORNING NEWS, Sept. 14, 1997, at 43A; Janet McConnaughey, *Few Seeking Licenses Under New Covenant Marriage Law*, BATON ROUGE ADVOC., Aug. 24, 1997, at 3B; *New Form of Marriage Not That Popular*, CHARLESTON GAZETTE & DAILY MAIL, Oct. 15, 1997, at 3D.

94. See *New Form of Marriage Not That Popular*, *supra* note 93, at 3D.

IV. THE IMPACT OF NO-FAULT DIVORCE

Covenant marriage is proposed to reduce the harm caused by divorce, and in particular, by no-fault divorce. The targeted “harms” include the effects of divorce on children and spouses, the relationship between no-fault divorce and the financial status of women, and the impact of no-fault divorce on the divorce rate.

A. On Children

Scholars differ about the precise effects of divorce on children, but the weight of the evidence suggests that children suffer the consequences of their parents’ estrangement. Covenant marriage proponents’ loudest cry is for the need to protect children from this harm by restricting access to divorce.

In 1989, Judith Wallerstein and Sandra Blakeslee published their landmark book, *Second Chances*, in which they followed sixty divorced families in California over a period of fifteen years.⁹⁵ In their book, Wallerstein and Blakeslee chronicled in gripping detail and for the first time the traumatic effects of divorce on children, both at the time of divorce and throughout later life. They concluded, “[d]ivorce is a wrenching experience for many adults and almost all children. It is almost always more devastating for children than for their parents.”⁹⁶ The effects were felt by all age groups. Preschool children suffered problems with separation; had trouble settling down or sleeping; resumed earlier behaviors such as thumb-sucking, bedwetting, or attachment to security objects; and became cranky, sad, and withdrawn.⁹⁷ Children aged five through eight experienced feelings of loss, rejection, guilt, and loyalty conflicts, and many suffered declines in school performance.⁹⁸ Nine- to twelve-year-olds felt anger, grief, anxiety, and loneliness, and sometimes exhibited somatic symptoms, delinquent behavior, and drops in school performance.⁹⁹ Adolescents were at particular risk, dealing with rejection and anxiety resulting from the collapse of their family structure just at the time that they are exploring their own sense of identity.¹⁰⁰

Wallerstein and Blakeslee’s study has been criticized for its lack of a control group and for its failure to consider the psychological adjustment of the children in the study prior to their parents’ divorce.¹⁰¹ However, other studies also have found that divorce has harmful effects on children. Children of divorce have an increased risk of disruptive disorders, anxiety disorders, and attention deficit

95. JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES* (1989).

96. *Id.* at 297.

97. *See id.* at 282-83.

98. *See id.* at 283.

99. *See id.* at 284.

100. *See id.* at 284-85.

101. *See, e.g.,* Barbara Ehrenreich, *In Defense of Splitting Up: The Growing Antidivorce Movement is Blind to the Costs of Bad Marriages*, *TIME*, Apr. 8, 1996, at 80; Katha Pollitt, *What’s Right About Divorce*, *N.Y. TIMES*, June 27, 1997, at A29.

hyperactivity disorders compared to children from intact families, regardless of the child's pre-divorce temperament or adjustment.¹⁰² Preschool children exposed to parental separation are more vulnerable to disruptive behavior problems and mood disorders, and children exposed to parental separation after age ten show increased risk of substance abuse.¹⁰³ Divorce affects children's self-esteem,¹⁰⁴ and young adult children of divorced parents experience more problems with submission and overcontrol.¹⁰⁵ In addition, the probability of attending college is lower for children from disrupted families than for those whose parents remain together.¹⁰⁶ Some of the behavior problems observed in children of divorce appear to be linked to a decline in economic circumstances.¹⁰⁷

Some researchers have discovered that it is other factors in a child's life, rather than the divorce itself, that increases the risk of psychological problems. As Wallerstein and Blakeslee pointed out:

Divorce is not an event that stands alone in children's or adults' experience. It is a continuum that begins in the unhappy marriage and extends through the separation, the divorce, and any remarriages and second divorces. Divorce is not the culprit; it may be no more than one of the many experiences that occur in this broad continuum.¹⁰⁸

This body of research suggests that many children's problems previously associated with divorce actually are "present many years before the marital disruption"¹⁰⁹ and that "exposure to these conditions may compromise children's economic, social, and psychological well-being in later life whether or not a separation takes place."¹¹⁰ According to one leading study:

[T]he evidence suggests that much of the effect of divorce on children can be predicted by conditions that existed well before the separation

102. See Stephanie Kasen et al., *A Multiple-Risk Interaction Model: Effects of Temperament and Divorce on Psychiatric Disorders in Children*, 24 J. ABNORMAL CHILD PSYCHOL. 121, 140-42 (1996).

103. See David M. Fergusson et al., *Parental Separation, Adolescent Psychopathology, and Problem Behaviors*, 33 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1122, 1129 (1994).

104. See Melissa K. Bynum & Mark W. Durm, *Children of Divorce and its Effect on Their Self-Esteem*, 79 PSYCHOL. REP. 447, 449 (1996).

105. See Robert Bolgar et al., *Childhood Antecedents of Interpersonal Problems in Young Adult Children of Divorce*, 34 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 143 (1995).

106. See Mike Powers, *The Hidden Costs of Divorce*, 25 HUM. ECOLOGY F. 4 (1997).

107. See Donna Ruane Morrison & Andrew J. Cherlin, *The Divorce Process and Young Children's Well-Being: A Prospective Analysis*, 57 J. MARRIAGE & FAM. 800, 811 (1995).

108. WALLERSTEIN & BLAKESLEE, *supra* note 95, at 297.

109. Paul R. Amato & Alan Booth, *A Prospective Study of Divorce and Parent-Child Relationships*, 58 J. MARRIAGE & FAM. 356, 363-64 (1996).

110. Frank F. Furstenberg, Jr. & Julien O. Teitler, *Reconsidering the Effects of Marital Disruption: What Happens to Children of Divorce in Early Adulthood?*, 15 J. FAM. ISSUES 173, 187 (1994).

occurred. . . . [T]hose concerned with the effects of divorce on children should consider reorienting their thinking. At least as much attention needs to be paid to the processes that occur in troubled, intact families as to the trauma that children suffer after their parents separate.¹¹¹

These studies warn that "failure to take into account the family processes and individual characteristics that lead up to marital dissolution may misrepresent or at least overstate the cost of divorce to children."¹¹²

The quality of the parents' marriage deserves particular attention. Several studies have determined that marital quality and parental conflict, not divorce, influence children's adjustment.¹¹³ One such study found that if conflict between parents is relatively low, children are worse off in early adulthood if their parents divorce, but if conflict between parents is high, children are better off if their parents divorced than if they remained married.¹¹⁴

While these studies focus on the precise cause of the social or emotional difficulties children of divorce experienced, a sizable body of scholarship reveals few or no differences between children whose parents have divorced and children of intact families. Divorce has been found to have negligible socio-emotional effects on adolescents,¹¹⁵ teens from divorced families have been found to be just as well-adjusted as teens from intact families,¹¹⁶ and young adults from divorced and intact families have been found to exhibit few significant differences.¹¹⁷ One study found that marital disruption increased boys' behavioral problems but had no effect on girls' behavioral problems.¹¹⁸ Regarding later adult relationships, young adults indicate a desire for and strong commitment to marriage, regardless of their parents' marital status,¹¹⁹ and adult children from divorced and intact

111. Andrew J. Cherlin et al., *Longitudinal Studies of Effects of Divorce on Children in Great Britain and the United States*, 252 SCI. 1386, 1388 (1991).

112. Furstenberg & Teitler, *supra* note 110, at 188.

113. See Amato & Booth, *supra* note 109, at 358; Teresa M. Cooney & Jane Kurz, *Mental Health Outcomes Following Recent Parental Divorce: The Case of Young Adult Offspring*, 17 J. FAM. ISSUES 495, 509 (1996); Fergusson et al., *supra* note 103, at 1129-30; Jean M. Muransky & Darlene DeMarie-Dreblow, *Differences Between High School Students from Intact and Divorced Families*, 23 J. DIVORCE & REMARRIAGE 187, 193-94 (1995); Karen Westervelt & Brian Vandenberg, *Parental Divorce and Intimate Relationships of Young Adults*, 80 PSYCHOL. REP. 923, 926 (1997).

114. See Paul R. Amato et al., *Parental Divorce, Marital Conflict, and Offspring Well-Being During Early Adulthood*, 73 SOC. FORCES 895 (1995).

115. See Ketty P. Gonzalez et al., *Adolescents from Divorced and Intact Families*, 23 J. DIVORCE & REMARRIAGE 165, 172-73 (1995).

116. See Muransky & DeMarie-Dreblow, *supra* note 113, at 194.

117. See Julie J. Evans & Bernard L. Bloom, *Effects of Parental Divorce Among College Undergraduates*, 26 J. DIVORCE & REMARRIAGE 69, 85 (1996).

118. See Morrison & Cherlin, *supra* note 107, at 810-11.

119. See Cathy Landis-Kleine et al., *Attitudes Toward Marriage and Divorce Held by Young Adults*, 23 J. DIVORCE & REMARRIAGE 63, 70 (1995).

families show no difference in their own marital quality.¹²⁰

B. On Spouses

Divorce is commonly associated with various forms of psychological and physical distress, leaving the impression that divorced people are unhappier and unhealthier than their married counterparts. For instance, according to William Galston, University of Maryland professor and former assistant to President Clinton for domestic policy, divorced men are twice as likely to die from heart disease, stroke, hypertension, and cancer as married men.¹²¹ A divorced woman's risk of dying from cancer is two to three times higher than the risk for a married woman.¹²²

Research, however, reveals a subtler relationship: It is social attachment, not marital status, that affects a person's well-being.¹²³ The presence or absence of a partner does have an impact on distress, but the presence or absence of a marriage does not.¹²⁴ Similarly, it is the lack of social and economic support that produces the negative consequences of divorce on individuals, not the fact of divorce itself.¹²⁵ Finally,

[a]lthough social attachments are associated with low depression levels, on average, negative social attachments are worse than none. People who report that their relationships are unhappy, that they often consider leaving their spouse or partner, and that they would like to change many aspects of their relationship have higher distress levels than people without partners. It is better to have no relationship than to be in a bad relationship.¹²⁶

C. On the Financial Status of Women

Divorce exacts a serious economic toll on women and children, but no-fault divorce laws do not exacerbate the problem. In a pioneering study, Lenore Weitzman found that in the first year after divorce, men experience an average of a forty-two percent increase in their standard of living, while women experience a seventy-three percent decline.¹²⁷ This study launched a critical evaluation of the nation's no-fault divorce laws. The reasons that Weitzman cited for this disparity included the inadequacy of financial awards granted to

120. See Pamela S. Webster et al., *Effects of Childhood Family Background on Adult Marital Quality and Perceived Stability*, 101 AM J. SOC. 404, 426 (1995).

121. William A. Galston, *Divorce American Style*, PUB. INTEREST, Summer 1996, at 12.

122. See *id.*

123. See Catherine E. Ross, *Reconceptualizing Marital Status as a Continuum of Social Attachment*, 57 J. MARRIAGE & FAM. 129, 137 (1995).

124. See *id.*

125. See *id.* at 138.

126. *Id.* at 139.

127. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 323 (1985).

women at divorce, the greater demands placed on women's limited resources after divorce, and the discrepancy between former husbands' and wives' earning power.¹²⁸

However, Richard Peterson, of the Social Science Research Council, has shown that Weitzman's results were in error,¹²⁹ as even Weitzman now admits.¹³⁰ Peterson's analysis indicates that the rise in men's standard of living after divorce is ten percent, and the decline in women's standard of living is twenty-seven percent.¹³¹ This, of course, still represents a significant gap in the financial status of men and women after divorce, but Peterson asserts that the introduction of no-fault divorce did not increase the gender gap.¹³² Other studies similarly have shown that no-fault divorce laws have little impact on the economic circumstances of women after divorce¹³³ and that fault-based divorce laws do not protect divorced women against the economic hardship of divorce.¹³⁴ Despite the lower standard of living that women face after divorce, throughout American history women have filed the majority of divorce actions.¹³⁵

D. On the Divorce Rate

There is no clear evidence that no-fault divorce has had any effect on the divorce rate in this country. One of the concerns most frequently cited in support of covenant marriage proposals is the need to take action to reduce the nation's high divorce rate.¹³⁶ According to this view, the divorce rate has increased as a result of no-fault divorce, so rolling back no-fault divorce laws will stem the tide in the divorce rate.

Divorces in America began increasing in the Nineteenth Century.¹³⁷ By the first half of this century, the divorce rate was relatively stable, ranging between

128. *Id.* at 340-43.

129. Richard R. Peterson, *A Re-Evaluation of the Economic Consequences of Divorce*, 61 AM. SOC. REV. 528, 534 (1996).

130. Lenore J. Weitzman, *The Economic Consequences of Divorce Are Still Unequal: Comment on Peterson*, 61 AM. SOC. REV. 537, 538 (1996).

131. Peterson, *supra* note 129, at 534.

132. Richard R. Peterson, *Statistical Errors, Faulty Conclusions, Misguided Policy: Reply to Weitzman*, 61 AM. SOC. REV. 539, 540 (1996).

133. See Herbert Jacob, *Another Look at No-Fault Divorce and the Post-Divorce Finances of Women*, 23 LAW & SOC'Y REV. 95, 111 (1989).

134. See Kay, *supra* note 35, at 68-70.

135. See Lawrence M. Friedman & Robert V. Percival, *Who Sues for Divorce? From Fault Through Fiction to Freedom*, 5 J. LEGAL STUD. 61, 70-75 (1976).

136. See, e.g., Ashton Applewhite, *Would Louisiana's "Covenant Marriage" Be a Good Idea for America?*, INSIGHT MAG., Oct. 6, 1997, at 25; Duren Cheek, *"Covenant Marriage" May Soon Be Option*, TENNESSEAN, Oct. 9, 1997, at 1A; Mary Beth Lane, *"Covenant Marriage" Bill Testimony Marked by Tears*, PLAIN DEALER, Oct. 16, 1997, at 5B; Ted Roelofs, *Plan Aims to Help Marriages*, GRAND RAPIDS PRESS, Oct. 6, 1997, at A1.

137. See *supra* notes 17-18 and accompanying text.

2.1 and 2.6 divorces per thousand population.¹³⁸ The trend that troubles policy-makers is the steady rise in the divorce rate that began in 1967.¹³⁹ Between 1967 and 1981, the divorce rate more than doubled, growing from 2.6 per thousand population in 1967 to 5.3 per thousand population in 1981.¹⁴⁰

There is much debate about why this increase occurred. Some, including those who seek to promote covenant marriage, argue that the growth in the divorce rate was the result of no-fault divorce. Others cite different factors, such as women's entrance into the workforce, which granted women greater social and economic independence, and cultural change, such as increased individualism and greater expectations of marriage. As support for these sociological explanations for the increase in the divorce rate, many point to the fact that this latest rise in divorce began before California enacted the first no-fault divorce law.

Researchers have attempted to demonstrate empirically whether no-fault divorce laws affected the divorce rate. The results are inconclusive. Most studies have found no effect,¹⁴¹ while some have found a limited effect,¹⁴² and some have found a significant positive effect.¹⁴³ Perhaps the most conclusive proof is time. Since 1981, the divorce rate in America has been declining, down to 4.6 divorces per thousand population in 1994, the lowest rate since 1974.¹⁴⁴

V. WHY MARRIAGES LAST

If one desires to focus attention on reducing the harmful effects of divorce, one must attempt to uncover what makes some marriages successful. Although to some, "success" simply may mean years of marriage, here the term will be expanded to encompass happiness in marriage. The secret formula remains elusive, but certain ingredients appear to be important.

138. See NAT'L CENTER FOR HEALTH STAT., MONTHLY VITAL STAT. REP., *Annual Summary of Births, Marriages, Divorces, and Deaths: United States, 1994*, Oct. 23, 1995, at 4.

139. See *id.*

140. See *id.*

141. See, e.g., GARY S. BECKER, A TREATISE ON THE FAMILY 333-34 (1991); David Lester, *Trends in Divorce and Marriage Around the World*, 25 J. DIVORCE & REMARRIAGE 169, 170 (1996); H. Elizabeth Peters, *Marriage and Divorce: Informational Constraints and Private Contracting*, 76 AM. ECON. REV. 437, 452 (1986).

142. See, e.g., Thomas B. Marvell, *Divorce Rates and the Fault Requirement*, 23 L. & SOC'Y REV. 543, 563-64 (1989); Martin Zelder, *The Economic Analysis of the Effect of No-Fault Divorce on the Divorce Rate*, 16 HARV. J.L. & PUB. POL'Y 241, 256-57 (1993).

143. See, e.g., Michael P. Kidd, *The Impact of Legislation on Divorce: A Hazard Function Approach*, 27 APPLIED ECON. 125 (1995); Paul A. Nakonezny et al., *The Effect of No-Fault Divorce Law on the Divorce Rate Across the 50 States and Its Relation to Income, Education, and Religiosity*, 57 J. MARRIAGE & FAM. 477, 485-87 (1995).

144. See NAT'L CENTER FOR HEALTH STAT., *supra* note 138, at 4; NAT'L CENTER FOR HEALTH STAT., MONTHLY VITAL STAT. REP., *Advance Report of Final Divorce Statistics, 1989 and 1990*, March 22, 1995, at 9.

Since completing their compelling study of divorced couples and their children,¹⁴⁵ Wallerstein and Blakeslee have tackled a different subject in their recent book *The Good Marriage*.¹⁴⁶ As the title suggests, the authors interviewed fifty couples in an attempt to discover common attributes of successful marriages.¹⁴⁷ As a result of their research, Wallerstein and Blakeslee identify nine tasks that couples must address in order to build and maintain a happy marriage. Describing these tasks as building blocks, the authors observe that “[i]f the issues represented by each psychological task are not addressed, the marriage is likely to fail, whether the couple divorces or remains legally married.”¹⁴⁸ The nine tasks described by Wallerstein and Blakeslee are: (1) complete the transition into adulthood by detaching from the family of origin (or in a second marriage, from the former spouse), committing emotionally to the new partner and relationship, and building new connections with extended families;¹⁴⁹ (2) build togetherness and unity while carving out areas of autonomy;¹⁵⁰ (3) maintain a balance between the responsibilities of parenthood and nurturing the adults’ relationship;¹⁵¹ (4) manage challenge and adversity in ways that strengthen rather than weaken the relationship;¹⁵² (5) make the relationship a safe place for expressing conflict, disagreement, and anger;¹⁵³ (6) maintain a pleasurable and fulfilling sexual relationship;¹⁵⁴ (7) include laughter and humor;¹⁵⁵ (8) provide emotional nurturance and encouragement;¹⁵⁶ and (9) draw on the images and joy of the early relationship and combine those with a realistic perspective of the present.¹⁵⁷ Another study, consisting of fifty-seven couples who had been married between twenty-five and forty-six years, found similar answers to the question of what makes marriages thrive.¹⁵⁸

145. See WALLERSTEIN & BLAKESLEE, *supra* note 95.

146. JUDITH WALLERSTEIN & SANDRA BLAKESLEE, *THE GOOD MARRIAGE* (1995).

147. *Id.* at 8-11.

148. *Id.* at 331.

149. *Id.*

150. *Id.*

151. *Id.* at 331-32.

152. *Id.* at 332.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. See Florence Kaslow & James A. Robison, *Long-Term Satisfying Marriages: Perceptions of Contributing Factors*, 24 AM. J. FAM. THERAPY 153, 165-67 (1996). This study described the essential ingredients of a successful marriage as including: commitment to the marriage and the spouse; respect for and responsibility to the spouse; fidelity, integrity, loyalty, and an expectation of reciprocity; trust, mutual support, and accountability; love, sense of belonging, and personal development; good communication skills; flexibility, cooperation, and good problem-solving skills; equitable power distribution, shared leadership, and joint decision-making; compromise and creativity in handling differences; shared values or spirituality; and fun and

Other research has looked at the impact of specific factors on marital quality. A sampling of that research confirms that daily behaviors and exchanges between spouses,¹⁵⁹ spouses' conflict resolution styles,¹⁶⁰ health problems,¹⁶¹ and socio-economics,¹⁶² among other factors, all may influence marital satisfaction. Interestingly, attitudes toward divorce do not seem related to marital disruption.¹⁶³

VI. ANALYSIS AND RECOMMENDATIONS

To analyze the potential effectiveness of the new covenant marriage proposals, it is important to identify the specific goals which the proposals seek to achieve. These goals include: lowering the divorce rate, returning to fault grounds for divorce, requiring a waiting period before a no-fault divorce can be granted, requiring counseling, and improving the economics for women and children. The following analysis addresses the likely impact of covenant marriage on each of these goals, and suggests other recommendations for achieving them.

A. Goal: Lower the Divorce Rate

If covenant marriage is proposed as a means simply to bring down the rate of divorce in America by rolling back no-fault divorce, the proponents of covenant marriage have missed the mark. The evidence that no-fault divorce has had any effect on the divorce rate is, at best, inconclusive and suggests that no-fault divorce laws were not the cause of the latest rise in the divorce rate observed from the late 1960s through the early 1980s.¹⁶⁴ In fact, the trend is not limited to the United States. "[I]n all Western countries where divorce is permitted, divorce rates have risen steadily over the [past hundred years], have fluctuated following each of the world wars, and have accelerated from sometime in the 1960s or early 1970s until the early 1980s."¹⁶⁵ Furthermore, in recent years, divorce rates in this country have been decreasing on their own, suggesting

friendship. *Id.*

159. See Patti L. Johnson & K. Daniel O'Leary, *Behavioral Components of Marital Satisfaction: An Individualized Assessment Approach*, 64 J. CONSULTING & CLINICAL PSYCHOL. 417, 420-21 (1996).

160. See Lawrence A. Kurdek, *Predicting Change in Marital Satisfaction from Husbands' and Wives' Conflict Resolution Styles*, 57 J. MARRIAGE & FAM. 153, 161 (1995).

161. See Alan Booth & David R. Johnson, *Declining Health and Marital Quality*, 56 J. MARRIAGE & FAM. 218, 222 (1994).

162. See Jessie M. Tzeng & Robert D. Mare, *Labor Market and Socioeconomic Effects on Marital Stability*, 24 SOC. SCI. RES. 329, 348-49 (1995).

163. See Kristin G. Esterberg et al., *Transition to Divorce: A Life-Course Approach to Women's Marital Duration and Dissolution*, 35 SOC. Q. 289, 302-03 (1994).

164. See *supra* notes 141-42 and accompanying text.

165. RODERICK PHILLIPS, *PUTTING ASUNDER* 584 (1988).

that legislative intervention, even if effective, is unnecessary.¹⁶⁶

Divorce is a complicated function of many socioeconomic and cultural factors. In the final paragraph of his book on the history of divorce over the last thousand years of Western culture, Roderick Phillips concludes:

[M]arriage stability, marriage breakdown, and divorce cannot be understood in isolation from their social context. It is fundamentally misleading and pointless to interpret the increase in marriage breakdown and divorce as evidence of the decline of matrimonial commitment or domestic morality. Marriage is integral to broad social, economic, demographic, and cultural processes, and it is entirely futile to expect marriage to remain constant or to have a consistent social meaning while social structures, economic relationships, demographic patterns, and cultural configurations have undergone the massive changes of the past centuries. If this book has shown anything, it is that divorce and marriage breakdown have their place in the history of Western society. Yet although we can isolate them as themes for particular study, they cannot be analyzed or understood without reference to the many broader facets of historical change.¹⁶⁷

Several recent historical conditions may contribute to divorce in today's society. The most obvious and frequently cited factor in the latter half of the Twentieth Century is the dramatic entrance of women, and married women in particular, into the labor market.¹⁶⁸ This factor alone has wrought enormous change in the concept of marriage and in the marital relationship. Employment can raise women's self-esteem, economic independence, and sense of alternatives outside of marriage. Employment of both spouses also creates pressure and stress within the family. Traditional gender roles, in which the husband was the breadwinner and the wife was responsible for maintaining the home and caring for the children, are utterly shattered.¹⁶⁹ During the same time that the family structure was responding to these massive changes, individuals' expectations of emotional fulfillment from marriage increased.¹⁷⁰

Changing the law to make divorce more difficult to obtain will not address any of these cultural challenges to marriage. As history has shown, restricting access to divorce as a means to reduce the divorce rate may be no more than an empty exercise. "[P]revailing customs and peoples' immediate wants can totally thwart and not just partly circumvent laws enacting morality."¹⁷¹ While attitudes toward divorce have changed in the last several decades,¹⁷² an individual's

166. See *supra* note 141 and accompanying text.

167. PHILLIPS, *supra* note 165, at 640.

168. See, e.g., *id.* at 620-22; Tzeng & Mare, *supra* note 162, at 348-49.

169. See PHILLIPS, *supra* note 165, at 620-22; Esterberg et al., *supra* note 163, at 302-03; Kay, *supra* note 35, at 21; Tzeng & Mare, *supra* note 162, at 349.

170. See PHILLIPS, *supra* note 165, at 623-24.

171. Marvell, *supra* note 142, at 565.

172. See PHILLIPS, *supra* note 165, at 624-27.

attitude toward divorce does not make him or her more or less likely to divorce.¹⁷³ Furthermore, current divorce rhetoric does couples an injustice. The “easy” divorce is lamented, resulting in proposals to make divorce more difficult. For the vast majority of couples, there is no such thing as an easy divorce, no matter what the controlling law. “The moment when it first becomes apparent that one’s marriage was a mistake is the beginning of probably the longest, darkest period in the human lifetime.”¹⁷⁴

B. Goal: Return to Fault Grounds for Divorce

Under Louisiana’s new covenant marriage law, divorce may be obtained by an “innocent” spouse if the other spouse has committed acts of adultery, felony, abandonment, or physical or sexual abuse.¹⁷⁵ These are similar to the grounds found in divorce statutes during the 1960s.¹⁷⁶ The reintroduction of fault-based grounds into the legal scheme of divorce is especially troubling. Such a suggestion belies either a lack of understanding or a conscious disregard of history. First, history has shown that even under a fault-based system of divorce, divorce rates rose.¹⁷⁷ Second, the recent transition to no-fault divorce should serve as a reminder that it was the serious and increasingly unacceptable shortcomings of fault-based divorce that led to the development of no-fault divorce in the first place.¹⁷⁸ Third, the requirement of proof of fault in a divorce proceeding by an “innocent” spouse against a “guilty” spouse reflects a characterization of spousal relationships that was outmoded thirty years ago and is hardly recognizable today. In a 1964 article describing the need to replace fault grounds in divorce, a University of Colorado law professor observed,

[t]he matrimonial offenses which are listed as grounds for divorce are not usually the basic psychological causes of marital failure, but more often are either symptoms of that failure, or are pretexts for escaping from the problems of marriage. Thus, the offense alleged should be seen as only one symptom of a larger problem—the overall disintegration of the marriage. The responsibility for the breakdown of the marriage is frequently shared by both spouses; hence, the present legal theory that one spouse is guilty and the other innocent is unrealistic.¹⁷⁹

Perhaps the most striking indictment of a return to fault grounds for divorce comes from the fact that many of the most outspoken and harshest critics of divorce and its consequences oppose a return to fault. Barbara Dafoe Whitehead, who gained popularity with conservatives for her *Atlantic Monthly* article entitled

173. See Esterberg et al., *supra* note 163, at 302.

174. Nora Johnson, *A Marriage on the Rocks*, ATLANTIC MONTHLY, July 1962, at 48.

175. LA. REV. STAT. ANN. § 9:307 (West. Supp. 1998).

176. See Friedman, *supra* note 24, at 661.

177. See *supra* notes 17-31 and accompanying text.

178. See *supra* notes 36-38 and accompanying text.

179. Clark, *supra* note 39, at 405.

*Dan Quayle Was Right*¹⁸⁰ and who also has authored a highly critical book entitled *The Divorce Culture*,¹⁸¹ argues that ending no-fault divorce will only add to the damage of divorce.¹⁸² A return to fault-based grounds for divorce will increase the costs of divorce actions, draining the pool of marital assets available to women and children, and will intensify the pain for children as their parents attribute blame for their breakup.¹⁸³ Whitehead concludes that “[n]o-fault laws didn’t create the divorce culture. The divorce rate began to go up nearly a decade before states adopted them. Repealing the no-fault system isn’t the way to bring it back down.”¹⁸⁴ Wallerstein and Blakeslee, in their book on the long-term consequences of divorce on former spouses and children, wrote:

Our findings do not support those who would turn back the clock. As family issues are flung to the center of our political arena, nostalgic voices from the right argue for a return to a time when divorce was difficult to obtain. But they do not offer solutions to the serious problems that have contributed to the rising divorce rate in the first place. . . . Like it or not, we are witnessing family changes which are an integral part of the wider changes in our society.¹⁸⁵

In a recent interview on the subject of covenant marriage and making divorce more difficult, Wallerstein said, “I’m a little worried. In America we tend to rush into things without thinking what their unintended consequences may be. . . . If you make divorce very difficult, you may get higher abandonment. You might get children even less protected economically.”¹⁸⁶ In another interview, she observed, “I think we have no idea how this is going to affect children, and divorces in situations where parents declare in a public forum what their accusations are against each other will cause a great deal of pain.”¹⁸⁷

In an article published, perhaps prophetically, in the *Louisiana Law Review*, a law professor and advocate of divorce law reform warned “[t]he unprecedented nature of many of the phenomena facing the family law reformer today means that we cannot simply plug in legal devices which worked well in an earlier time and under different conditions.”¹⁸⁸ Even Lenore Weitzman, who severely criticizes no-fault divorce for causing economic harm to women and children,

180. Barbara Dafoe Whitehead, *Dan Quayle Was Right*, ATLANTIC MONTHLY, Apr. 1993, at 47.

181. BARBARA DAFOE WHITEHEAD, *THE DIVORCE CULTURE* (1997).

182. Barbara Dafoe Whitehead, *Should Breaking Up Be Harder to Do? No-Fault Divorce Statutes Should Not Be Repealed*, L.A. DAILY J., Jan. 17, 1997, at 6.

183. *See id.*

184. *Id.*

185. WALLERSTEIN & BLAKESLEE, *supra* note 95, at 305.

186. Mary Ann Hogan, *The Good Marriage?*, MOTHER JONES, July-Aug. 1995, at 18.

187. Julie Irwin, *Ohio Bill Would Raise Bar for Divorce*, CINCINNATI ENQUIRER, Aug. 20, 1997, at A1.

188. Mary Ann Glendon, *Family Law Reform in the 1980's*, 44 LA. L. REV. 1553, 1555 (1984).

does not advocate a return to fault.

We do not have to abandon the nonadversarial aims of the no-fault reforms to accomplish these goals. Nor do we have to return to the charade of the fault-based traditional system. The reformers correctly diagnosed many of the problems in the traditional system and correctly prescribed remedies to alleviate them. . . . This research has shown that the no-fault reforms have generally had a positive effect on the divorce process¹⁸⁹

Finally, the American people are ambivalent about changing divorce laws. In a recent *Time/CNN* poll, fifty percent of those surveyed said that it should be harder for married couples to get a divorce, yet fifty-nine percent said that the government should not make it harder for people to get a divorce.¹⁹⁰

Rather than attempting to make divorce more difficult, in a yearning for some ideal family of an imaginary past, policy-makers should focus on the cultural and socioeconomic realities that contribute to divorce today. A thorough analysis of these subjects is beyond the scope of this Note, but several areas merit attention. Spouses should be given support for coping with new gender roles and new models of distribution of labor within the household. Economic and educational opportunities should be available to both spouses to provide adequate financial support for the family. Accessible and affordable child care must be available for working parents. Finally, workplace demands and personnel policies should enable spouses to invest in and nurture satisfying marital and family relationships.

*C. Goal: Require a Waiting Period Before a No-Fault Divorce
Can Be Granted*

States should proceed cautiously when considering longer waiting periods preceding divorce. Although it was not included in the original version of the bill, the covenant marriage law passed in Louisiana allows a couple to obtain a divorce from a covenant marriage "after living separate and apart continuously without reconciliation for a period of two years."¹⁹¹ Under the traditional marriage law in Louisiana, a couple may divorce after a six-month separation.¹⁹² Prior to the transition to no-fault divorce, several states' divorce laws allowed divorce after lengthy separations.¹⁹³ Many of these states reduced the waiting period when no-fault laws were passed.¹⁹⁴

189. WEITZMAN, *supra* note 127, at 366, 382.

190. See Walter Kirn, *The Ties That Bind*, TIME MAG., Aug. 18, 1997, at 49.

191. LA. REV. STAT. ANN. § 9:307 (West Supp. 1998).

192. LA. CIV. CODE ANN. art. 102, 103 (West 1993 & Supp. 1998).

193. See Kay, *supra* note 35, at 6; Marvell, *supra* note 142, at 544; Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 52-68 (1966).

194. See Marvell, *supra* note 142, at 552-54. See, e.g., MD. CODE ANN., FAM. LAW § 7-103 (1991); N.C. GEN. STAT. § 50-6 (1996); S.C. CODE ANN. § 20-3-10 (Law. Co-op. 1985); VT. STAT.

One researcher found that states that shortened the separation period required to obtain a divorce experienced a rise in their divorce rates.¹⁹⁵ From this, he inferred that “longer waiting periods might reduce the number of divorces in a state”¹⁹⁶ However, he was careful to point out that it was not clear whether this effect might be the result of longer waiting periods prompting more reconciliations or more out-of-state divorces.¹⁹⁷

The theory behind an extensive waiting period is that it gives couples a chance to “cool off,” think carefully about whether they truly want to terminate their marriage, engage in counseling, or attempt reconciliation. Couples can, of course, voluntarily take the time to do all of these things before filing for divorce. State-mandated separation periods can create risks. For instance, some couples may have no interest in taking time to reconsider their decision to divorce, resulting in a new era of migratory divorce.

More devastating is the potential impact of mandatory waiting periods on women and children. Already economically disadvantaged by divorce, women and children may now be faced with enduring a lengthy separation period during which they would not have the benefit of property division or child support payments available upon divorce. Resort to the old familiar devices of abandonment, collusion, and perjury to demonstrate “fault” is inevitable.¹⁹⁸

Ironically, the statutory separation requirement itself may thwart reconciliation. Since the statute requires that the couple live apart “continuously without reconciliation”¹⁹⁹ for two years, couples who wish to preserve their option to divorce may be discouraged from attempting to resume cohabitation or marital relations.

D. Goal: Require Counseling

Louisiana’s covenant marriage law, like covenant marriage bills in other states, requires couples to participate in premarital counseling before getting a marriage license and requires them to seek counseling again before being granted a divorce. *Chicago Tribune* columnist Clarence Page echoes the reaction of many people in declaring the requirement of premarital counseling, “the best part of the bill.”²⁰⁰ In the *Time/CNN* poll on Americans’ attitudes toward divorce, sixty-four percent of respondents said that couples should be required to take a marriage education course before they can get a marriage license.²⁰¹

Increasing the availability of premarital counseling or marriage education

ANN. tit. 15, § 551 (1989); VA. CODE ANN. § 20-91 (Michie 1995).

195. Marvell, *supra* note 142, at 563-65.

196. *Id.* at 564.

197. *Id.*

198. See *supra* notes 24-30 and accompanying text.

199. LA. REV. STAT. ANN. § 9:307 (West Supp. 1998).

200. Clarence Page, *Happily Ever After? Fix Marriages Before They Start*, CHI. TRIB., Aug. 20, 1997, at 19.

201. See Kirn, *supra* note 190, at 49.

programs holds promise for strengthening marriage relationships. Even this course, however, should be approached with sobriety. Counseling and education programs are not all created equal, and even the best program or therapist cannot reach an unreceptive audience. As Barbara Dafoe Whitehead acknowledged in a recent interview, “[i]t’s impossible to get them to contemplate troubles, adversity, conflict, especially if it’s their first marriage and they are fairly young. It’s not a teachable moment.”²⁰² One can imagine the “covenant marriage counseling” shops that might spring up to provide couples with quick, easy counseling sessions, complete with the required signed and notarized attestation, on their way to the clerk of the court’s office for their marriage license. Under those circumstances, the requirement would have little effect. In fact, there is data that shows that premarital counseling does not affect marital outcomes.²⁰³ This study, however, did not distinguish among different types of counseling programs, and the authors themselves cautioned, “the present data do not demonstrate that premarital programs are generally unhelpful; indeed, it is quite likely that some of the couples in these studies participated in highly effective premarital programs.”²⁰⁴

Research suggests that professionals should focus on several key factors which have been shown to affect marital quality and stability.²⁰⁵ Several comprehensive premarital assessment questionnaires are now available and in use by counselors and educators to assist in evaluating couples’ fitness for marriage and in preparing couples for the challenges ahead.²⁰⁶

For supporters of premarital counseling, the question of whether counseling

202. Ellen Goodman, Editorial, *On the Highway of Love, Louisiana Will Road-Test Two Marriage Choices: Regular or High-Test?*, BOSTON GLOBE, Aug. 10, 1997, at D7.

203. See Kieran T. Sullivan & Thomas N. Bradbury, *Are Premarital Prevention Programs Reaching Couples at Risk for Marital Dysfunction?*, 65 J. CONSULTING & CLINICAL PSYCHOL. 24, 29 (1997).

204. *Id.*

205. See Jeffry H. Larson & Thomas B. Holman, *Premarital Predictors of Marital Quality and Stability*, 43 FAM. RELATIONS 228, 234-37 (1994). The first area is to focus on assessing each partner’s individual traits and behaviors related to later marital quality and stability, including: emotional health, self-esteem, neurotic behaviors, sociability, and dysfunctional relationship beliefs; conventionality; and physical health. The second area is to assess homogamy, interpersonal similarity, and interactional processes, including: similarity of race, socioeconomic status, religion, intelligence, age, and absolute status; similarity of values, attitudes, beliefs, and sex role orientations; and interactional processes. The third area is to assess background and contextual factors, including family of origin, sociocultural factors, and current contextual factors, such as: parental marital stability, parental mental illness, family dysfunction, and support from family for marriage; age at marriage, educational level, socioeconomic status, income, occupation, and race; seeking support from friends; and external pressures, including societal stressors such as economic booms, recessions, war, and job or career pressures, and internal pressures such as parental intimidation or overinvolvement. *Id.* at 235-36.

206. See Jeffry H. Larson et al., *A Review of Comprehensive Questionnaires Used in Premarital Education and Counseling*, 44 FAM. RELATIONS 245 (1995).

should be mandated by the state is still open to debate. For instance, what is the consequence if a couple cannot afford the required counseling? Fortunately, a number of programs have been developed voluntarily and are being offered to couples around the country.²⁰⁷ These programs involve clergy, schools, courts, and other members of the community in seeking to help couples strengthen marriages.²⁰⁸ A study of one program, PREP: The Prevention and Relationship Enhancement Program, disclosed a lower rate of separation and divorce for couples who had used the program.²⁰⁹

Community marriage policies are an exciting example of this trend. Championed by Michael McManus, nationally syndicated columnist and president and co-chairman of the Marriage Savers Institute, community marriage policies involve agreements among churches of all denominations to work together to strengthen marriage. McManus believes that, "it is possible to push down the divorce rate. A number of things do work at every stage of the marital cycle."²¹⁰ Under a community marriage policy, churches require couples to undergo four months of marriage preparation, including the completion of a premarital inventory, before being married in the church. According to McManus, ten percent of couples decide to break their engagement upon seeing the results of their premarital inventory.²¹¹ These couples' scores typically are within the same range as those of couples whose marriages end in divorce.²¹² For couples who go forward with their plans, the church's commitment does not end with the wedding ceremony. In each church, couples with successful marriages are trained to mentor others.²¹³

The first community marriage policy was adopted in Modesto, California in 1986.²¹⁴ Today, community marriage policies are in force in seventy-two communities around the country.²¹⁵ McManus claims that Modesto's divorce rate has declined by forty percent, resulting in 1000 fewer divorces each year.²¹⁶ In Peoria, Illinois, divorces declined from 1210 divorces in 1991 to 985 in 1996, and Albany, Georgia, and Montgomery, Alabama, each have experienced declines of approximately eleven percent.²¹⁷ While churches have been the primary focus of community marriage policies (as McManus points out, seventy-

207. See Elizabeth Gleick, *Should This Marriage Be Saved?*, TIME, Feb. 27, 1995, at 48; Hara Estroff Marano, *Rescuing Marriages Before They Begin*, N.Y. TIMES, May 28, 1997, at B9.

208. See Marano, *supra* note 207, at B9.

209. See Scott M. Stanley et al., *Strengthening Marriages and Preventing Divorce: New Directions in Prevention Research*, 44 FAM. RELATIONS 392, 395 (1995).

210. Telephone Interview with Michael J. McManus, President and Co-Chairman, Marriage Savers Institute (Nov. 2, 1997).

211. *Id.*

212. *Id.*

213. *Id.*

214. See *id.*

215. See *id.*

216. *Id.*

217. See *id.*

four percent of couples are married in churches), judges and other local officials are becoming involved in some communities.²¹⁸ The American Bar Association's Family Law Section has developed a ten-week marriage education course for junior and senior high school students. Called PARTNERS, the curriculum teaches essential relationship skills and gives students a realistic view of the challenges of marriage before they marry.²¹⁹

There is also an incentive for businesses to get involved. Marital distress results in decreased productivity and increased absenteeism among employees.²²⁰ Employer-sponsored marriage education, counseling, or intervention programs are a cost-effective means of enhancing employees' personal well-being while increasing business profits.²²¹

Counseling also is important at the other end of the marital spectrum, when couples are contemplating or preparing for divorce. In this situation, counseling is emphasized not so much as an attempt to repair the marriage, although that certainly should be encouraged for couples who desire it, but as a critical means of dealing with the negative effects of divorce on children.²²²

"Every aspect of the children's lives can be made easier by the parents' attitudes at the time of the crisis as well as later," proclaim Wallerstein and Blakeslee.²²³

At a minimum, the variety of supports and services for divorcing families needs to be expanded in scope and over time. These families need education at the time of the divorce about the special problems created by their decision. They need help in making decisions about living arrangements, visiting schedules, and sole or joint custody. And they need help in implementing these decisions over many years—and in modifying them as the children grow and the family changes. Divorcing families need universally available mediation services. They also need specialized counseling over the long haul in those cases where the children are at clear risk, where the parents are still locked in bitter disputes, and where there has been family violence.²²⁴

In particular, parents should be counseled against interfering in their son's or daughter's relationship with the other parent.²²⁵ The children themselves should be offered professional support and guidance, either in the community or through

218. *See id.*

219. FAMILY LAW SECTION, AMERICAN BAR ASSOCIATION, PARTNERS FOR STUDENTS: A CURRICULUM ADJUNCT TO TEACH FAMILY LAW AND RELATIONSHIP SKILLS.

220. *See* Melinda S. Forthofer et al., *Associations Between Marital Distress and Work Loss in a National Sample*, 58 J. MARRIAGE & FAM. 597, 600, 602 (1996).

221. *See id.* at 604.

222. *See supra* Part IV.A.

223. WALLERSTEIN & BLAKESLEE, *supra* note 95, at 285.

224. *Id.* at 306.

225. *See* Bolgar et al., *supra* note 105, at 142.

school-based support services.²²⁶

E. Goal: Improve the Economics for Women and Children

Covenant marriage legislation does nothing to address the financial status of women and children. The legislation makes no revisions in the determination of property division, child support, or spousal support. The goal of covenant marriage is to improve the standard of living of women and children by keeping them in the same household with their husbands and fathers. But when divorce occurs, women and children will still suffer financially.²²⁷ Covenant marriage legislation may increase the financial burden by requiring costly litigation to establish fault or by subjecting families to a prolonged waiting period before a divorce can be granted.²²⁸

Lenore Weitzman may have overstated the gender gap between husbands and wives and their post-divorce finances, but a gender gap still exists.²²⁹ No-fault divorce did not create this circumstance,²³⁰ so the solution does not lie in a return to fault grounds for divorce. Weitzman suggests several responses, tailored toward the particular circumstances of the divorcing wives and their children.

First, child support awards should be designed to equalize the standards of living between the custodial and non-custodial households, should include automatic cost-of-living adjustments, and must be enforced. The custodial parent of minor children should be allowed to maintain the family home, and college-age dependent children should be provided with support to complete their education. Glendon argues for a "children-first principle," in which the first priority for distribution of family property upon divorce would be to secure the welfare of the couple's children.²³¹ Weitzman also suggests clear standards for custody awards so that custody is not used as a bargaining chip in financial negotiations.²³² Second, according to Weitzman, long-married older housewives should be entitled to permanent support at a level sufficient to maintain the same standard of living as their former husbands.²³³ Third, custodial parents should be given the family home, support aimed at maintaining the same standard of living as their former spouse, and generous resources in the years immediately following divorce to allow them to invest in education, training, and career counseling to maximize their long-term employment prospects.²³⁴ Fourth, middle-aged women who have foregone career opportunities in order to raise children should be awarded an equal share of the marital partnership, including

226. See Kasen et al., *supra* note 102, at 143.

227. See *supra* Part IV.C.

228. See *supra* notes 181, 184 and accompanying text; discussion at Part VI.C.

229. See *supra* Part IV.C.

230. See *supra* notes 132-35 and accompanying text.

231. Glendon, *supra* note 188, at 1559.

232. WEITZMAN, *supra* note 127, at 379-80.

233. *Id.* at 380-81.

234. See *id.* at 381.

the husband's career assets and enhanced earning capacity; training, counseling, and education if necessary to begin, resume, or upgrade employment; and compensation for lost career opportunities.²³⁵ This latter element is emphasized in another recent treatise on the economics of divorce, in which it is suggested that courts should recognize the decrease in value of the human capital of the spouse who invests directly in the other's career or in the assets of the marriage.²³⁶

CONCLUSION

Those who talk most about the blessings of marriage and the constancy of its vows are the very people who declare that if the chain were broken and the prisoners left free to choose, the whole social fabric would fly asunder. You cannot have the argument both ways. If the prisoner is happy, why lock him in? If he is not, why pretend that he is?²³⁷

Covenant marriage legislation will fail at its intended purpose, because legal restrictions on divorce do not create healthier families. In an historical refrain, divorce reformers again are decrying the high divorce rate and seeking to rewrite the states' divorce laws in order to save the family.²³⁸ Covenant marriage, whose primary feature is a limitation on the grounds for divorce, is one current initiative.²³⁹ Covenant marriage is not a new approach to the problem; it is merely the ghost of a system that was declared dead three decades ago.²⁴⁰ Covenant marriage's reinstatement of fault grounds for divorce will return the divorce process to a system of perjury, collusion, and abandonment²⁴¹ without addressing the underlying causes or effects of marital breakdown.²⁴² History has taught that divorce laws in America have little impact on the rate of divorce²⁴³ and that more restrictive divorce laws do not keep couples together when they want to be apart.²⁴⁴ Social changes impact divorce laws; divorce laws do not effect social change.²⁴⁵

There are alternatives, however, if policy-makers are serious about addressing the negative consequences of marital breakdown. Premarital counseling and marital education could encourage couples to consider the challenges of marriage, potentially preventing troubled marriages before they

235. See *id.* at 381-82.

236. See ALLEN M. PARKMAN, NO-FAULT DIVORCE: WHAT WENT WRONG? 41-42 (1992).

237. GEORGE BERNARD SHAW, MAN AND SUPERMAN, act III.

238. See *supra* Part II., notes 17-20 and accompanying text.

239. See *supra* Part III.

240. See *supra* notes 32-38, 175-79 and accompanying text.

241. See *supra* notes 24-31 and accompanying text.

242. See *supra* Part VI.B.

243. See *supra* Parts IV.D., VI.A.

244. See *supra* notes 6-7, 24-31 and accompanying text.

245. See *supra* Parts V.D., VI.A., notes 8-11, 17-19 and accompanying text.

begin.²⁴⁶ However, legislatively mandated premarital counseling may not be the answer. Premarital counseling is likely to be most effective for couples who are motivated by a genuine, sincere desire to explore their readiness for marriage. Counseling perceived as simply one more legal requirement to be completed before the wedding ceremony may have little impact. Religious organizations, schools, family law practitioners, political leaders, government organizations, friends and family can use their influence to encourage couples to engage in voluntary premarital counseling or education before the flowers are ordered and the invitations are mailed.²⁴⁷ These same people and institutions should encourage married couples contemplating divorce to seek counseling for the sake of their children.²⁴⁸

State legislators should review and amend laws governing financial support upon divorce.²⁴⁹ Where the effect of current law is to disadvantage children economically because of their parents' decision to divorce, statutes should be revised and child support orders enforced.

Covenant marriage is good public relations but bad public policy. Making divorce more difficult will not make marriage stronger or the divorce rate lower, as history has already shown. Returning to fault-based divorce will provide a quick reminder of why that system was abandoned a generation ago. Those who are serious about addressing the problems of marital disruption should focus their attention on the institutions that influence couples' personal choices, both at the time of marriage and at the time of divorce, and on the support we provide for children when their parents cannot live together anymore.

246. See *supra* notes 200-19 and accompanying text.

247. See *supra* notes 207-21 and accompanying text.

248. See *supra* notes 222-27 and accompanying text.

249. See *supra* Parts IV.C. and VI.E.

THE WRITTEN DESCRIPTION REQUIREMENT OF 35 U.S.C. § 112(1): THE STANDARD AFTER *REGENTS OF THE UNIVERSITY OF CALIFORNIA V. ELI LILLY & CO.*

MARK J. STEWART*

INTRODUCTION

The field of biotechnology is progressing at an extremely rapid rate. This technology has tremendous potential for medicine, agriculture, and industry. Because United States academic and industrial research institutions are worldwide leaders in the development of biotechnology, the United States Patent and Trademark Office ("USPTO") and the Federal Courts have been at the forefront of the world's legal systems in developing patent laws to protect these types of inventions. The particular nature of biotechnology inventions, especially those involving recombinant deoxyribonucleic acid ("DNA") and protein, has necessitated the creation of specific patent laws and rules to govern their protection.¹ In addition, the way in which traditional legal principles should be applied to biotechnology inventions is uncertain.²

Out of the thousands of gene patents issued, only a few DNA patents have been challenged in the courts. Thus, courts need to continue developing the law to enable biotechnology companies to secure meaningful patent protection on DNA and protein related inventions.³ The tremendous amount of time and money spent by companies to bring a biotechnology invention to market emphasizes the importance of providing a predictable approach to the patenting of DNA and proteins.

The courts have attempted to provide some guidance in this area of patent law by focusing on the application of the written description requirement in the Patent Act, 35 U.S.C. § 112.⁴ This Note begins with a review of the evolution

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1. See, e.g., 35 U.S.C. § 103(b) (Supp. II 1996); 37 C.F.R. § 1.801-.809 (1997) (discussing the deposit requirement for biotechnology inventions).

2. See Rebecca S. Eisenberg & Robert P. Merges, *Opinion Letter As To the Patentability of Certain Inventions Associated With the Identification of Partial cDNA Sequences*, 23 AM. INTELL. PROP. L. ASS'N Q.J., Winter 1995, at 1, 3-51 (discussing the application of the utility, novelty, nonobviousness, and disclosure requirements to inventions involving DNA sequences).

3. Currently, approximately 350 "huge sequence" patent applications are pending in the USPTO with over 500,000 sequences. In addition, over 5000 applications have been filed for entire genes with over 1500 gene patents issued. USPTO Presentation, Group 1800 Interesting Facts (Sept. 15, 1997) (unpublished manuscript, on file with author).

4. 35 U.S.C. § 112(1) (1994). See *Regents of the Univ. of Cal. v. Eli Lilly & Co.*, 119 F.3d 1559, 1566 (Fed. Cir. 1997), *cert. denied*, 118 S. Ct. 1548 (1998) (finding that compliance with the written description requirement is a question of fact); *Fiers v. Revel*, 984 F.2d 1164, 1170 (Fed. Cir.

of the written description requirement, followed by a discussion of how the recent decision of *Regents of the University of California v. Eli Lilly & Co.*⁵ affected the law regarding that requirement for biotechnology inventions claiming DNA sequences. Finally, this Note anticipates the impact the Federal Circuit may have on the ability of inventors to assert broad claims based on the discovery of a single gene, and discusses whether the decision is consistent with overarching policies and purposes behind the law governing patents.

I. BACKGROUND: THE LAW OF PATENTS

The United States Constitution gives Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁶ This grant of power prompted the First Congress to enact the Patent Act of 1790 (the “Act”).⁷ The Act granted a limited monopoly of fourteen years and required that the invention be novel as well as “sufficiently useful and important.”⁸ In addition, the Act required the inventor to file a specification which would distinguish the invention from other materials and enable a “person skilled in the art . . . to make, construct, or use the same, to the end that the public may have the full benefit thereof, after the expiration of the patent term.”⁹

Congress altered the language somewhat in the three acts that followed.¹⁰ However, today’s patent laws, embodied in the Patent Act of 1952,¹¹ are quite similar to the Patent Act of 1790 in that it is based on the policy to encourage innovation and at the same time avoid “monopolies which stifle competition without any concomitant advance in the ‘Progress of Science and useful Arts.’”¹² The protection of technological innovations induces individuals to expend time, money, and energy in the inventive process.

The 1952 Patent Act expressly provides that “[p]atents shall have the attributes of personal property.”¹³ Thus, an inventor who has a valid patent has the right to exclude all others from making, using or selling the invention.¹⁴ The

1993) (explaining that meeting the description requirement will vary depending on the nature of the invention claimed).

5. 119 F.3d 1559 (Fed. Cir. 1997).

6. U.S. CONST. art. I, § 8, cl. 8.

7. Act of April 10, 1790, ch. 7, § 2, 1 Stat. 109, 110.

8. *Id.* § 1.

9. *Id.* § 2.

10. Act of Feb. 21, 1793, ch. 11, § 3, 1 Stat. 318, 321; Act of July 4, 1836, ch. 357, § 6, 5 Stat. 117; Act of July 8, 1870, ch. 230, § 26, 16 Stat. 198, 201.

11. Act of July 19, 1952, ch. 950, § 1, 66 Stat. 792 (codified as amended at 35 U.S.C. §§ 1-376 (1994 & Supp. II 1996)).

12. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989) (quoting U.S. CONST. art. I, § 8, cl. 8).

13. 35 U.S.C. § 261 (1994).

14. *Id.* § 271 (1994 & Supp. II 1996).

basic “quid pro quo” contemplated by the Constitution and Congress for granting a limited patent monopoly is the benefit the public receives from the disclosure of something new and useful.¹⁵ “[T]he ultimate goal of the patent system is to bring new designs and technologies into the public domain through disclosure.”¹⁶

A properly functioning patent system will provide ownership benefits to an inventor while providing society with the benefits of the disclosure of that invention. Inventors are given an incentive to make technological advances, which induces rapid dissemination of scientific information to the public. Thus, all inventions should be subject to basic rules of patentability consistent with these important goals.

In order for an inventor to obtain a patent, an invention must be useful,¹⁷ novel,¹⁸ non-obvious,¹⁹ and sufficiently described and enabled²⁰ in a patent application.²¹ The courts have read the utility requirement to mean the invention must serve a practical purpose.²² The utility requirement is not met if the only use of the invention is in experimental research or in some potential future use not yet determined.²³ The novelty requirement does not require absolute novelty, but instead requires only that the invention not be in the hands of the public as of the filing date²⁴ or, in some cases, before the actual invention took place.²⁵ Nonobviousness prohibits the patenting of inventions which are readily evident or obvious in light of material that is already available to the public.²⁶

Once a patent is filed, it undergoes extensive examination by the USPTO. This is known as patent prosecution and generally involves a dialogue with an examiner with respect to questions of patentability. An inventor will seek the

15. *Bonito Boats*, 489 U.S. at 151.

16. *Id.*

17. *See* 35 U.S.C. § 101 (1994).

18. *See id.* § 102.

19. *See id.* § 103 (1994 & Supp. II 1996).

20. *See id.* § 112(1) (1994).

21. The different parts of a patent application required by law are listed in 35 U.S.C. § 111 (1994). These include: a complete description of the invention, claims defining the invention, drawings (when necessary to explain or diagram the invention), an oath or declaration specifying that the applicant is the original inventor, and a filing fee. *Id.*

22. *See* *Anderson v. Natta*, 480 F.2d 1392, 1395 (C.C.P.A. 1973).

23. *See* *Brenner v. Manson*, 383 U.S. 519, 535 (1966).

24. *See* 35 U.S.C. §§ 102 (b), (d) (1994). If certain events, such as a printed publication, a patent, or a public use or sale occur more than one year before the U.S. filing date, the applicant is barred from ever obtaining a valid patent on the subject matter. *See id.*

25. *See id.* §§ 102 (a), (e), (g). Under certain circumstances, such as the occurrence of a printed publication, the filing of a patent application, the dissemination of the invention to public knowledge, or the use of the invention by others, prior to the time the applicant invented the claimed subject matter, a valid patent cannot be issued. *See id.*

26. *See id.* § 103 (1994 & Supp. II 1996). The obviousness question concerns whether the invention would have been obvious at the time of the invention to one of “ordinary skill in the art” to which the invention pertained. *Id.*

broadest patent protection possible while the examiner will attempt to limit the scope of the patent to comply with the legal requirements of patentability.

The USPTO seeks to issue valid patents. An issued patent in the United States has a presumption of validity which can be a powerful benefit should the need arise to bring suit against an infringer.²⁷ Validity, however, is ultimately determined by the federal court system in an infringement or declaratory judgment action. Congress created the Court of Appeals for the Federal Circuit in 1982 to hear exclusively patent cases and to establish consistency in the law of patents.²⁸

The patent application itself provides a basis from which the USPTO can make an initial determination of whether the invention meets various statutory requirements. The application serves to identify the specific invention and to define its boundaries. In addition, it discloses the invention to the public in such a way as to enable another person to make or use it once the patent term expires.²⁹ Thus, the specification of the application must sufficiently disclose the invention to the public.

The specification contains several main parts.³⁰ Most applications begin by discussing the relevant background of the invention which includes a review of the related prior art.³¹ This section is necessary to understand the advance an invention is making in a particular field. The background is followed by a brief summary of the invention. This section defines the invention in a way that allows a lay person (or a technically untrained judge) to understand it. The applicant generally presents the summary to provide support for the broadest claims in the application.³²

The specification also includes a description of the "preferred embodiments"

27. See *id.* § 282; see also *American Hoist & Derrick Co. v. Sowa & Sons, Inc.*, 725 F.2d 1350, 1358 (Fed. Cir. 1984) (finding that the court must be persuaded by clear and convincing evidence that the patent in issue is invalid).

28. See DONALD S. CHISUM, 1997 PATENT LAW DIGEST vii (Matthew Bender & Co. 1997).

29. See 2 DANIEL R. CHERRY ET AL., PATENT PRACTICE § 9.2 (Patent Resource Inst., Inc., 6th ed. 1995).

30. See PATENT AND TRADEMARK OFFICE, U.S. DEP'T OF COMMERCE, MANUAL OF PATENT EXAMINING PROCEDURE § 608.01(a) (6th ed. 1995 & Supp. 1997) [hereinafter M.P.E.P.]. This section of the M.P.E.P. lists the parts of the application which should be included: background of the invention; brief summary of the invention; brief description of the several views of the drawing; detailed description of the invention; claim or claims; abstract of the disclosure; drawings; and executed oath or declaration. *Id.*

31. "Prior Art" is a term of art pertaining generally to publications (journal articles, published patents, etc.) or other public disclosures which are relevant to the claimed invention.

32.

A brief summary of the invention indicating its nature and substance, which may include a statement of the object of the invention, should precede the detailed description. Such summary should, when set forth, be commensurate with the invention as claimed and any object recited should be that of the invention as claimed.

37 C.F.R. § 1.73 (1997).

(also known as the “detailed description”) and must recite one or more claims.³³ This part of the patent application particularly serves the function of increasing public knowledge to spur further research and assures that the invention will be available to the public once the patent expires.³⁴ The detailed description and the claim(s) must meet the requirements defined in § 112 of the Patent Act of 1952.³⁵ The claims must define the invention in such detail that the world of prospective infringers and judges who construe the claims understand the nature of the claimed subject matter. The claims define the boundaries of the invention. Only the invention defined by the claims needs to be described in the specification. This specification has a direct bearing on whether the claims are given a broad or narrow interpretation.³⁶ Thus, it is important that the entire specification be considered when interpreting the claim boundaries.³⁷ In addition, because the claims define the invention in which property rights are created, the second paragraph of § 112 requires the claim language to be precise and definite.³⁸

II. 35 U.S.C. § 112, FIRST PARAGRAPH

In order for an invention to be adequately disclosed in the specification, the first paragraph of 35 U.S.C. § 112 sets forth several requirements.

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.³⁹

The USPTO and the courts interpret this paragraph to contain three independent requirements: (1) a written description of the invention; (2) a disclosure of how to make and use the invention (enablement); and (3) the best mode of practicing

33. See M.P.E.P. § 608.01(a).

34. Patent applications filed in the United States before June 8, 1995 may elect a term of 17 years from date of issuance. See 37 C.F.R. § 1.14(b) (1995). Patents which issue from applications filed after June 7, 1995 are given a term of 20 years from the date of filing. See 37 C.F.R. § 1.14(b) (1997).

35. 35 U.S.C. § 112 (1994).

36. If the specification does not provide support (such as an adequate written description or an enabling description) for a broad interpretation of a particular claim, it must be given a narrower interpretation. See *Minnesota Mining & Mfg. Co. v. Johnson & Johnson Orthopaedics, Inc.*, 976 F.2d 1559 (Fed. Cir. 1992) (noting that it is entirely proper to use the specification to interpret the claims).

37. See 1 IRVING KAYTON, PATENT PRACTICE § 2.6 (Patent Resource Inst., Inc., 6th ed. 1995).

38. 35 U.S.C. § 112(2) (1994).

39. *Id.* § 112(1).

the invention.⁴⁰ Failure of a patent application to satisfy any of these requirements is grounds for rejection of the application or invalidation of an issued patent.⁴¹

An application meets the enablement requirement if it discloses the invention well enough to permit a person "skilled in the art" to make and use that invention.⁴² Thus, an enablement determination must be made from the viewpoint of a hypothetical person skilled in the art. The level of knowledge of this person is a fact-sensitive inquiry and will vary depending on the particular technology being employed.⁴³ In addition, the application must allow the invention to be fully available to the public such that a skilled artisan can practice the invention without extensive experimentation or research.⁴⁴

The patent specification must also disclose the best mode of practicing or carrying out the invention.⁴⁵ This, however, is the best mode contemplated by the inventor and not the best mode in an absolute sense.⁴⁶ Thus, even if there is a better method of practicing the invention, the patent is not invalidated if the inventor does not know about it.⁴⁷

III. DEVELOPMENT OF A DISTINCT WRITTEN DESCRIPTION REQUIREMENT

At first glance, it would seem as if the written description requirement could be easily satisfied. In fact, patent experts, researchers, and judges have even argued that this is not a separate requirement at all.⁴⁸ For several years before the

40. See *Vas-Cath, Inc. v. Mahurkar*, 935 F.2d 1555 (Fed. Cir. 1991); *Amgen, Inc. v. Chugai Pharm. Co.*, 927 F.2d 1200, 1210 (Fed. Cir.), *cert. denied*, 502 U.S. 856 (1991).

41. See 35 U.S.C. §§ 112(1), 282 (1994). Failure to meet the best mode requirement can potentially invalidate the entire patent, whereas failure to meet the written description and enablement requirements apply to individual claims.

42. See *In re Wands*, 858 F.2d 731 (Fed. Cir. 1988).

43. This person need only have ordinary skill in a particular field. He or she is not necessarily an expert in the field and thus, is not presumed to know all prior art in the field. See 2 DONALD S. CHISUM, PATENTS § 7.03[2][b] (Supp. 1997).

44. See *In re Wands*, 858 F.2d at 737. "The test is not merely quantitative, since a considerable amount of experimentation is possible, if it is merely routine, or if the specification in question provides a reasonable amount of guidance with respect to the direction in which the experimentation should proceed." *Id.* See also John C. Todaro, *Enablement in Biotechnology Cases after In re Goodman*, FORDHAM INTELL. PROP. MEDIA & ENT. L. J. (1994) (providing a detailed discussion of the enablement requirement and its specific application in biotechnology cases).

45. See 35 U.S.C. § 112(1) (1994).

46. See *Kaken Pharm. Co., Ltd. v. United States Int'l Trade Comm'n*, 111 F.3d 143 (Fed. Cir. 1997) (discussing the best mode requirement in the context of avoiding conception and concealment).

47. See *id.*

48. See *In re Barker*, 559 F.2d 588, 594 (C.C.P.A. 1977) (Markey, J., dissenting) (finding mistaken the majority's "attempt to create historical and current statutory support for a separate

creation of the Court of Appeals for the Federal Circuit, courts inconsistently decided whether a written description requirement separate from that of the enablement and best mode requirements even existed.⁴⁹

In 1977, in *In re Barker*,⁵⁰ the Court of Customs and Patent Appeals (“CCPA”) considered an examiner’s rejection of a patent application based on an insufficient written description in the specification.⁵¹ The court held that a distinct written description requirement was consistent with legislative history and the underlying policies of the 1952 Patent Act.⁵² Judge Markey’s dissenting opinion, however, described the majority’s interpretation of § 112 as “exaltive of form over substance.”⁵³ Judge Markey viewed the enablement requirement as supporting the purpose and “quid pro quo” of the patent system without the need for a separate written description requirement.⁵⁴ He stated, “I cannot see how one may, in ‘full, clear, concise and exact terms,’ enable the skilled to practice an invention, and still have failed to ‘describe’ it.”⁵⁵

In a 1987 opinion, the Federal Circuit seemed to partially adopt Markey’s view.⁵⁶ The court stated that the purpose of the written description requirement is to communicate that which is needed to enable one skilled in the art to make and use the claimed invention.⁵⁷ Thus, it would seem from this opinion that the term “written description” is a mere modifier of the enablement requirement.

In a later case, the Federal Circuit laid the controversy to rest and affirmatively stated that a separate written description requirement exists distinct from the enablement and best mode requirements.⁵⁸ The *Vas-Cath* court considered whether drawings in a design patent provided a sufficient description to support later-asserted claims to a device.⁵⁹ To clarify the law regarding § 112,

description requirement.”); Application of Ruschig, 379 F.2d 990, 995 (C.C.P.A. 1967) (where an inventor argued that § 112 requires only enablement of the invention). See also Laurence H. Pretty, *The Recline and Fall of Mecyanical Genus Claim Scope Under “Written Description” in the Sofa Case*, 80 J. PAT. & TRADEMARK OFFICE SOC’Y 469, 470 (1998).

49. See *Vas-Cath, Inc. v. Mahurkar*, 935 F.2d 1555, 1560 (Fed. Cir. 1991) (acknowledging inconsistent precedent with respect to whether a written description requirement exists separate from the enablement and best mode requirements).

50. 559 F.2d 588 (C.C.P.A. 1977).

51. *Id.*

52. *Id.*

53. *Id.* at 594 (Markey, J., dissenting).

54. *Id.*

55. *Id.* at 595.

56. *Kennecott Corp. v. Kyocera Int’l, Inc.*, 835 F.2d 1419, 1421 (Fed. Cir. 1987).

57. *Id.*

58. See *Vas-Cath, Inc. v. Mahurkar*, 935 F.2d 1555, 1563 (Fed. Cir. 1991).

59. On March 8, 1982, Mahurkar filed a design application with six drawings depicting a double lumen catheter. On October 1, 1984 Mahurkar filed a utility patent application claiming the benefit of the design application’s filing date. Mahurkar could only claim the benefit of the March 8 filing date if the specification in that application was sufficient to support the later (October 1) claimed invention. See *id.* at 1558.

the court reviewed prior case law and set forth a standard for determining compliance with the written description requirement as well as a statement of its purpose and applicability.

The written description requirement serves “to put the public in possession of what the party claims as his [or her] own invention”⁶⁰ Requiring an inventor to distinguish his invention through a written description allows for a determination of the novelty of the invention and puts the public on notice of the specific property rights that are protected.⁶¹ In addition, the requirement prevents an inventor from overreaching the boundaries of his invention or claiming more than what his or her invention truly is.⁶²

In *Vas-Cath*, the court also stated what is necessary to fulfill the written description requirement: “Although [the applicant] does not have to describe exactly the subject matter claimed, . . . the description must clearly allow persons of ordinary skill in the art to recognize that [he or she] invented what is claimed.”⁶³ Furthermore, an adequate written description must clearly show that the applicant was in possession of the invention as of the filing date of the application.⁶⁴ Arguably, this is somewhat different from asking if the specification clearly conveys information that the applicant invented what is claimed.

Prior case law would allow an inventor to obtain a patent on an invention that was never actually made or used (reduced to practice) prior to the filing of an application, as long as the other disclosure requirements were met.⁶⁵ The filing of the application itself was considered a constructive reduction to practice. Thus, an inventor who could envision an invention in enough detail could obtain patent protection without ever reducing the invention to a physical form.⁶⁶

60. *Id.* at 1561. See also *Evans v. Eaton*, 20 U.S. (7 Wheat.) 356 (1822).

61. See *Vas-Cath*, 935 F.2d at 1561.

62. See *id.*; see also *Rengo Co. v. Molins Machine Co.*, 657 F.2d 535, 551 (3d Cir. 1981).

63. *Vas-Cath*, 935 F.2d at 1563 (quoting *In re Gosteli*, 872 F.2d 1008, 1012 (Fed. Cir. 1989)) (alteration in original).

64. See *id.* at 1564.

65. See *Hybritech Inc. v. Monoclonal Antibodies, Inc.*, 802 F.2d 1367, 1376 (Fed. Cir. 1986), *cert. denied*, 480 U.S. 947 (1987).

66. The United States is a “first to invent” country, unlike most foreign countries where there is a “first to file” system. Thus, in the United States proving the date of invention can be critical to the ability to obtain patent rights. The date of invention involves conception of “a definite and permanent idea of the complete and operative invention as it is thereafter to be applied in practice.” *Mergenthaler v. Scudder*, 11 App. D.C. 264, 276 (1897). The invention date can coincide with the date the inventor conceived of the invention only if the inventor was diligent toward reducing the invention to practice. The date of invention, however, in the unpredictable arts (chemistry and biology) is generally determined only upon reduction to practice. American Intellectual Property Law Ass’n, *Basic Chemical and Biotechnology Patent Practice Seminar* (Fall 1994) (manuscript on file with author). The latest date of invention will be the filing date of the application. This is known as a “constructive reduction to practice.” If, at a later date, the disclosure of that application is determined to be insufficient, then a constructive reduction to

It is unclear whether the *Vas-Cath* court imposed an additional sufficiency requirement by stating that the written description must provide proof of possession of the invention at the time of filing. In many cases, especially in the chemical arts, it may be difficult to satisfy the written description requirement and prove the applicant was in possession of the invention as of the filing date without first actually reducing the invention to practice.

The same general standards relating to the written description requirement apply in any situation where the validity of a patent's claims are called into question because they are not adequately described in the specification. In addition, the requirement applies to all statutory categories of invention.⁶⁷ The basic test is always whether the disclosure conveys to those skilled in the art that the applicant had possession of the subject matter claimed.⁶⁸

The written description requirement becomes an issue in several different contexts.⁶⁹ The most common situation occurs when an applicant attempts to add a claim at some point after the original filing date of the invention.⁷⁰ If this subsequent claim is not sufficiently described in the original specification, i.e., the written description requirement is not met, then this claim will not receive the benefit of the earlier filing date.⁷¹ The unsupported claims will be deemed "new matter" and must be filed in a separate application receiving a later filing date.⁷²

The filing date can be critical especially in the rapidly progressing and highly competitive biotechnology industry. The filing date is the *prima facie* date of the invention for determining novelty, priority, and nonobviousness.⁷³ In addition,

practice has not taken place. A date of invention earlier than the filing date of the application requires an actual reduction to practice. This occurs when the invention is reduced to some physical form demonstrating that the invention works. See KAYTON, *supra* note 37, § 2.46.

67. Statutory categories of invention include "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof . . ." 35 U.S.C. § 101 (1994). Plants are patentable subject to the requirements in 35 U.S.C. § 161 and designs are patentable subject to the requirements in 35 U.S.C. § 171. 35 U.S.C. §§ 161, 171 (1994).

68. See *Vas-Cath*, 935 F.2d at 1564.

69. See *In re Smith*, 481 F.2d 910, 914 (C.C.P.A. 1973) (noting the description requirement can arise in any of three different contexts: (1) "an assertion of entitlement to the filing date of a previously filed application under § 120," (2) "in the interference context wherein the issue is support for a count in the specification of one or more of the parties," or (3) "in an *ex parte* case involving a single application, but where the claim at issue was filed subsequent to the filing of the application . . .").

70. See *Vas-Cath*, 935 F.2d at 1555; *In re Kaslow*, 707 F.2d 1366 (Fed. Cir. 1983) (rejecting later amended claims when description requirement was not met).

71. See 3 DONALD S. CHISUM, CHISUM ON PATENTS § 7.04 (Supp. 1997).

72. "No amendment shall introduce new matter into the disclosure of an application after the filing date of the application . . ." 37 C.F.R. § 1.118(a) (1997).

73. Often an applicant will be able to provide evidence of an earlier date of the invention for the purpose of novelty and nonobviousness determinations. The filing date, however, is *prima facie* evidence of the latest date of the invention. See KAYTON, *supra* note 37, § 2.46.

the date is critical for determining statutory bar provisions.⁷⁴ Thus, for questions dealing with the priority date for an invention such as in an interference context,⁷⁵ the written description in the specification will be closely scrutinized.

In a priority contest, courts focus on the conception of the invention to determine inventorship.⁷⁶ In the chemical arts, a determination of complete conception often cannot be made until an invention is reduced to practice.⁷⁷ This is known as the doctrine of simultaneous conception and reduction to practice. "In the experimental sciences of chemistry and biology . . . [the] element of unpredictability frequently prevents a conception separate from actual experiment and test."⁷⁸ Thus, this doctrine is also applied in biotechnology cases.⁷⁹

In chemical cases courts hold that "knowledge of the structure, name, formula, definitive chemical or physical property and knowledge of the method of obtaining the compound, unless the method is routine, is required to prove conception."⁸⁰ The written description requirement is scrutinized in these types of priority contests because filing a patent application may be the only evidence of a reduction to practice (constructive reduction to practice) to prove conception.⁸¹ The written description then becomes corroborating evidence of conception.⁸²

Throughout the evolution of the written description requirement, the courts consistently emphasized the fact-sensitive nature of the issue.⁸³ Courts considered "the nature of the invention and the amount of knowledge imparted to those skilled in the art"⁸⁴ when deciding questions based on the disclosure requirements in § 112(1). Thus, the unique nature of the biotechnology industry and the newness of the technology creates uncertainty with respect to what will be sufficient to satisfy the written description requirement.

74. See 35 U.S.C. § 102 (b) (1994).

75. An interference proceeding is a determination of priority of invention between two or more inventors claiming the same invention. A procedural burden with respect to proving priority is placed upon the last to file. See 37 C.F.R. § 1.601(i) (1997); 35 U.S.C. § 135(a) (1994).

76. See *Mueller Brass Co. v. Reading Indus., Inc.*, 487 F.2d 1395 (3rd Cir. 1973).

77. See *Smith v. Bousquet*, 111 F.2d 157, 159 (C.C.P.A. 1940).

78. *Id.*

79. See, e.g., *Amgen, Inc. v. Chugai Pharm. Co. Ltd.*, 927 F.2d 1200 (Fed. Cir.) (analyzing the completeness of conception for claims to a DNA sequence), *cert. denied*, 502 U.S. 856 (1991).

80. *Oka v. Youssefieh*, 849 F.2d 581 (Fed. Cir. 1988).

81. See *supra* note 67 and accompanying text.

82. See *Burroughs Wellcome Co. v. Barr Lab.*, 40 F.3d 1223 (Fed. Cir. 1994) (holding that conception requires a mental event and objective, corroborating evidence), *cert. denied*, 116 S. Ct. 771 (1995).

83. See, e.g., *In re Smith*, 458 F.2d 1389, 1395 (C.C.P.A. 1972) (stating that determination of compliance with § 112 is a case-by-case inquiry); *In re Dileone*, 436 F.2d 1404 (C.C.P.A. 1971) (stating that what is necessary to fulfill the written description requirement varies depending on nature of invention).

84. *In re Wertheim*, 541 F.2d 257, 262 (C.C.P.A. 1976).

IV. THE TECHNOLOGY

Biotechnology is defined as the use of cellular processes (bacteria, plant, or animal) to make therapeutically valuable products.⁸⁵ Because this Note focuses on the application of the written description requirement to biotechnology inventions involving recombinant DNA, a brief discussion of that technology is necessary.

Most lay people would be comfortable with defining “gene” as a functional unit of inheritance controlling the transmission of one or more traits. The advent of molecular biotechnology, however, has created a somewhat more complex definition. Forty-six chromosomes exist in the nucleus of almost every cell in the human body. Each chromosome contains thousands of individual genes. Genes are made of strands of DNA and DNA is a polymer of four different nucleotide bases (A, G, C, and T).⁸⁶ The genetic information within DNA is conveyed by the sequence of its four building blocks. A gene can be compared to a long sentence built from a four-letter alphabet.⁸⁷ The letters (or bases in the case of DNA) must be present in a specific arrangement in order for the sentence to make sense.

A gene is a sequence of DNA that codes for a protein and a gene is expressed when its DNA is used to make protein. Proteins are made of amino acids which are joined together in a particular order. There are twenty amino acids found in proteins and the order and number of those amino acids with respect to each other in a single protein specifies its function.⁸⁸ Proteins include things such as hormones, enzymes, and structural materials for cells. One or more codons, which are a group of three nucleotides in a gene, encode a particular amino acid.⁸⁹ Because there are sixty-three possible codon triplets using the four bases, some amino acids are coded for by multiple codons. For example, the codons GGT, GGG, GGA, and GGC all code for the amino acid glycine. This is what is referred to as the degeneracy of the genetic code.⁹⁰ Thus, even though one may know the sequence of amino acids for a particular protein, one cannot determine

85. See TEXTBOOK OF BIOCHEMISTRY WITH CLINICAL CORRELATIONS 757 (Thomas M. Devlin ed. 1997) [hereinafter TEXTBOOK OF BIOCHEMISTRY]. A set of laboratory techniques developed within the last twenty years have been partly responsible for the scientific and commercial interest in biotechnology, the founding of many new companies, and the redirection of research efforts and financial resources among industrial and academic institutions.

86. See JAMES D. WATSON ET AL., MOLECULAR BIOLOGY OF THE GENE 240-41 (4th ed. 1987).

87. See *id.* at 78.

88. See TEXTBOOK OF BIOCHEMISTRY, *supra* note 85, at 25-28.

89. See WATSON ET AL., *supra* note 86, at 223. Protein production is called translation because it involves the translation of information from the four-letter language of DNA into the twenty-letter language of proteins. Proteins are formed by the sequential addition of amino acids in a specific order, which is determined by the nucleotide sequence of the gene. See *id.* at 433.

90. See *id.* at 437.

with any certainty the natural sequence of the corresponding gene.

The order of bases provides the code that gives each type of cell, such as a muscle cell or nerve cell, its special characteristics. Even though the nucleus of every cell within a single individual has the same DNA, not all of the same genes are expressed in every cell type.⁹¹ Gene expression involves the two main processes of transcription and translation. Because protein production occurs outside the nucleus of the cell, the genetic information (in the form of DNA) in the nucleus must somehow be taken outside the nucleus to allow specific proteins to be made. This is done using messenger ribonucleic acid ("mRNA").⁹² The DNA is transcribed into mRNA which is actually a mirror image of the DNA.⁹³ The mRNA is then processed so it can leave the nucleus and be translated into protein outside the nucleus. The processing involves splicing out parts of the gene which do not code for protein sequence (introns) and splicing together the protein coding pieces of the gene (exons).⁹⁴

Thus, for each type of cell, only a certain subset of genes will be expressed. For example, in muscle cells, genes involved in muscle contraction (i.e. myosin and actin)⁹⁵ will be expressed whereas genes involved in nerve cell function will not. Each cell has a particular set of signals which will turn on expression of the appropriate genes.

Genetic engineering encompasses recombinant DNA technology, which involves the joining together of two different DNA molecules. Recombinant DNAs can be prepared from a variety of organisms including bacteria, viruses, animals, and humans.⁹⁶ Recombinant DNA technology opened the way for production of large quantities of recombinant DNA and is frequently used to produce proteins. Before the advent of recombinant DNA technology, protein therapeutics, such as insulin or growth hormone, were isolated and purified from slaughtered animals. This process was expensive, time consuming, and produced only small amounts of protein.

To produce a protein by recombinant means, the complementary DNA ("cDNA") encoding the protein must first be cloned.⁹⁷ A cDNA is basically a gene without introns. It is made from processed mRNA through reverse transcription.⁹⁸ Whereas a gene can be 100,000 bases long, a cDNA (a gene without introns) will generally be around 1500 to 3000 bases long. The isolation of the cDNA is often performed by screening a cDNA library.⁹⁹

91. *See id.* at 696-98.

92. *See id.* at 698-701.

93. *See id.* at 703-10.

94. *See id.* at 83-85.

95. *See id.* at 696-98.

96. *See* JAMES DARNELL ET AL., *MOLECULAR CELLULAR BIOLOGY* 248-49 (1986).

97. *See* JOSEPH SAMBROOK ET AL., *MOLECULAR CLONING: A LABORATORY MANUAL* §§ 8.27, 16.68 (2d ed. 1989).

98. *See id.* at § 12.6.

99. A cDNA library is made from mRNA isolated from a particular cell type. Thus, only those genes which are being expressed in that cell type will be represented in the library. The

The isolated DNA can then be expressed in bacteria or another suitable host and the resulting protein isolated. Many vectors (plasmids) have been constructed which permit expression of animal genes in bacteria cells.¹⁰⁰ The isolated gene of interest can be combined with the bacterial expression vector and then inserted into bacteria or other types of cells that rapidly replicate their DNA and divide.¹⁰¹ These cells replicate the foreign DNA right along with their own. Thus, a huge bacterial population can produce useful quantities of recombinant DNA molecules as well as the specific proteins that those molecules code for.

In addition to the use of a cloned gene to mass produce large amounts of protein, cloned genes are also employed in gene therapy. This technology allows defective genes present in specific types of somatic cells to be replaced with the correct (non-mutated) form of the gene.¹⁰² Thus, obtaining patent protection on a gene sequence as well as the corresponding protein having therapeutic value is critical to the survival of the biotechnology industry. The biotechnology industry is rapidly developing recombinant protein therapeutics as well as somatic cell gene therapy technology and these types of therapies have the potential to cure many of the nearly 4000 different genetic diseases known.

V. THE WRITTEN DESCRIPTION REQUIREMENT OF 35 U.S.C. § 112(1) FOR BIOTECHNOLOGY INVENTIONS

There have been very few biotechnology patent law cases at the Federal Circuit level. Interestingly, of the few cases that the Federal Circuit has decided, several involved the issue of compliance with the written description requirement.¹⁰³ In *Amgen, Inc. v. Chugai Pharmaceutical, Co.*,¹⁰⁴ the Federal Circuit analyzed the priority date of an invention in a patent infringement case. Even though the court focused mainly on the completeness of conception, applying the doctrine of simultaneous conception and reduction to practice, many other courts use the reasoning from *Amgen* as a foundation to determine the

mRNA is reverse transcribed using probes which randomly hybridize to the mRNA. The resulting mixture of cDNAs then are cloned into a vector and screened. Degenerate probes can be generated based on the amino acid sequence of the protein and used to screen the library. Clones which hybridize to the probe are sequenced. Generally cDNAs are isolated because they are easier to work with than whole genes and if the goal is to express them in bacteria, the bacteria must be tricked into thinking they are making an endogenous protein. Unlike eukaryotic genes, bacterial genes do not have introns.

100. See *id.* at § 17.

101. See *id.* at § 17.3.

102. See TEXTBOOK OF BIOCHEMISTRY, *supra* note 85, at 793.

103. See *Regents of the Univ. of Cal. v. Eli Lilly & Co.*, 119 F.3d 1559 (Fed. Cir. 1997), *cert. denied*, 118 S. Ct. 1548 (1998); *Fiers v. Revel*, 984 F.2d 1164 (Fed. Cir. 1993); *Amgen, Inc. v. Chugai Pharm. Co., Ltd.*, 927 F.2d 1200 (Fed. Cir.), *cert. denied*, 502 U.S. 856 (1991).

104. 927 F.2d 1200 (Fed. Cir.), *cert. denied*, 502 U.S. 856 (1991).

sufficiency of a written description for applications claiming DNA sequences.¹⁰⁵

In *Amgen*, Amgen sued Genetics Institute ("GI") and Chugai Pharmaceuticals for patent infringement. The Amgen patent issued on October 27, 1987 and contained claims to the DNA sequence encoding human erythropoietin ("EPO"), a protein that stimulates the production of red blood cells. Prior to Amgen's cloning of the EPO gene, however, GI had isolated and purified the EPO protein as well as disclosed a method of purifying and isolating the EPO DNA sequence.¹⁰⁶ The USPTO issued a patent to GI in 1987 claiming the EPO protein.¹⁰⁷ GI did not clone the EPO cDNA until August, 1984 and began making recombinant EPO shortly thereafter.¹⁰⁸ Amgen claimed priority of invention based on EPO clones that were isolated in 1983.¹⁰⁹ The Federal Circuit held that the Amgen patent was not invalidated based on the earlier disclosure by GI of a probing strategy to screen a DNA library even though this strategy eventually resulted in the actual cloning of the gene by GI.¹¹⁰ GI's disclosure was insufficient to constitute a conception of the DNA encoding EPO.¹¹¹ Applying chemical case law precedent,¹¹² the *Amgen* court found:

Conception does not occur unless one has a mental picture of the structure of the chemical, or is able to define it by its method of preparation, its physical or chemical properties, or whatever characteristics sufficiently distinguish it. It is not sufficient to define it solely by its principle biological property, e.g., encoding human erythropoietin, because an alleged conception having no more specificity than that is simply a wish to know the identity of any material with that biological property.¹¹³

The court did not invoke the requirement that the actual DNA sequence be disclosed, but only that the DNA be defined in a way to distinguish it from other chemicals along with a description of how to obtain it.¹¹⁴ This left open the possibility of adequately describing a particular DNA even when the inventor is unaware of its structure.¹¹⁵

105. See *Fiers*, 984 F.2d at 1164.

106. See *Amgen*, 927 F.2d at 1205.

107. See *id.* at 1203.

108. See *id.* at 1205-06.

109. See *id.*

110. *Id.* at 1206.

111. See *id.*

112. See *Oka v. Youssefeyeh*, 849 F.2d 581, 583 (Fed. Cir. 1988). The court, in *Amgen*, classified DNA as a complex chemical compound and held that "it is well established in our law that conception of a chemical compound requires that the inventor be able to define it so as to distinguish it from other materials, and . . . describe how to obtain it." *Amgen*, 927 F.2d at 1206.

113. *Amgen*, 927 F.2d at 1206.

114. *Id.*

115. See Peter F. Corless, *Recombinant DNA Inventions After Fiers*, 16 HOUS. J. INT'L L. 509, 520 (1994).

In 1993, the Federal Circuit applied the holding in *Amgen* to a case where three parties claimed patent rights to the DNA encoding human beta interferon ("β-IF"). In *Fiers v. Revel*,¹¹⁶ Revel sought to use the benefit of an Israeli application date as a constructive reduction to practice to prove priority of invention for β-IF. The court held that the Israeli application did not contain an adequate written description of a DNA encoding β-IF.¹¹⁷ The court concluded, "[a]n adequate written description of a DNA requires more than a mere statement that it is part of the invention and reference to a potential method for isolating it; what is required is a description of the DNA itself."¹¹⁸ The *Fiers* court reasoned that a statement claiming the DNA in conjunction with a method of isolating it by reverse transcription did not indicate that Revel was in possession of the DNA.¹¹⁹

The court went on to note that the reasoning applied in the *Amgen* case, with respect to what is necessary to show conception, also applies to the adequacy of descriptions of DNA.¹²⁰

As we stated in [*Amgen*] . . . such a disclosure just represents a wish, or arguably a plan, for obtaining the DNA. If a conception of a DNA requires a precise definition, such as by structure, formula, chemical name, or physical properties, . . . then a description also requires that degree of specificity. . . . [O]ne cannot describe what one has not conceived.¹²¹

Thus, it is clear from the *Fiers* decision that there must be some specific characterization of the DNA itself to convey to one skilled in the art that the inventor was in possession of the DNA at the time of filing. The court held that Sugano, another party in the action, was entitled to priority because the disclosure in his application contained "the complete and correct sequence of the DNA which codes for β-IF, along with a detailed disclosure of the method used by Sugano to obtain that DNA."¹²²

VI. *REGENTS OF THE UNIVERSITY OF CALIFORNIA V. ELI LILLY & CO.*

In July 1997, the Federal Circuit again considered the written description requirement for DNA inventions in *Regents of the University of California v. Eli Lilly & Co.*¹²³ The court's decision has generated controversy as well as uncertainty with respect to what practical aspects of patent practice will be

116. 984 F.2d 1164, 1166 (Fed. Cir. 1993).

117. *Id.* at 1171.

118. *Id.* at 1170.

119. *Id.* at 1170-71.

120. *Id.* at 1171.

121. *Id.*

122. *Id.*

123. 119 F.3d 1559 (Fed. Cir. 1997).

affected.¹²⁴

The *Lilly* case centers on a seven year patent battle over the insulin gene. In 1977, researchers at the University of California ("UC") cloned the rat insulin gene.¹²⁵ This discovery was made at a time when recombinant DNA technology was still in its infancy. There was a race to clone the insulin gene because of the enormous potential commercial use of recombinant insulin in the treatment of diabetes.

Prior to the development of recombinant DNA techniques, both purified pig and cow insulins were commonly used to treat diabetics. Because of the differences in the amino acid sequence from human insulin, some individuals had an allergic response to the injected animal insulins.¹²⁶ In addition, the process of purifying animal insulin was time consuming and expensive. In 1982, Lilly began marketing synthetic human insulin made by a process, some steps of which were licensed from Genentech. Later in 1986, Lilly switched to a production technique utilizing an insulin precursor rather than a method employing the separate production of the two chains of insulin which could then be combined to make insulin.¹²⁷

After cloning the rat insulin gene in 1977, UC filed a patent application claiming the rat and human insulin genes as well as all other vertebrate and mammalian insulin genes. That patent issued to UC on March 24, 1987 for an invention entitled "Recombinant Bacterial Plasmids Containing Coding Sequences of Insulin Genes" (the "'525 patent").¹²⁸ In 1990, UC sued Lilly for infringing claims of the '525 patent as well as claims in an additional patent. Lilly responded that not only did it not infringe the '525 patent, but UC's claims in that patent were invalid. The claims at issue were Claims 1 and 2 directed to vertebrate insulin encoding DNA and Claims 4 and 5 limited to mammalian and human cDNA respectively.¹²⁹ Both the District Court¹³⁰ and the Federal Circuit¹³¹ agreed with Lilly that the claims in the '525 patent were invalid because of an inadequate written description in the patent specification.

The Federal Circuit court relied on the reasoning in *Amgen* and *Fiers* to invalidate UC's claims despite the differences between those cases and *Lilly*.¹³² The most fundamental difference was that unlike the inventors in *Amgen* and

124. See generally Eliot Marshall, *A Bitter Battle Over Insulin Gene*, 277 SCI. 1028 (1997).

125. See *Lilly*, 119 F.3d at 1562.

126. See Marshall, *supra* note 124, at 1028.

127. See *id.*

128. *Lilly*, 199 F.3d at 1562-63. An additional UC patent ('740) was also at issue involving the production of recombinant human insulin. The *Lilly* court, however, found that Lilly did not infringe this patent through the production of its recombinant human proinsulin fusion protein. *Id.* at 1572.

129. *Id.* at 1562-63.

130. *Regents of the Univ. of Calif. v. Eli Lilly & Co.*, 39 U.S.P.Q.2d 1225, 1241 (S.D. Ind. 1995).

131. *Lilly*, 119 F.3d at 1568.

132. *Id.*

Fiers, the UC inventors had actually isolated, cloned, and characterized a cDNA (the rat insulin gene). The '525 patent disclosure contained a description of the isolation of the rat insulin mRNA, the synthesis and characterization of the rat insulin cDNA, a method of obtaining the human cDNA for insulin using constructive examples incorporating the same method used to obtain the rat cDNA, and the amino acid sequences of the human insulin A and B chains already known in the prior art.¹³³ The court held, however, that this was not enough to adequately describe the cDNA encoding human insulin.¹³⁴

UC's primary argument was that the disclosure of the cDNA in a single species, the rat, necessarily entitled them to an entire genus of cDNAs that includes the human cDNA.¹³⁵ UC also argued that the examples in the disclosure describe how to obtain the cDNA for human insulin and thus, were a sufficient written description of that DNA.¹³⁶ The court, however, noted that even if the disclosure was enabling, it did not sufficiently describe the DNA.¹³⁷ The disclosure did not provide any information distinguishing the cDNA from other DNAs such as information "pertaining to that cDNA's relevant structure or physical characteristics."¹³⁸ In addition, nothing in the disclosure supported the proposition that UC was in possession of the human insulin cDNA at the time of filing. In fact, UC inventors did not actually clone the human cDNA until two years after the '525 application was filed.¹³⁹

VII. IMPACT OF THE *LILLY* DECISION ON PATENT PRACTICE: WHAT IS THE STANDARD AFTER *LILLY*?

The *Lilly* case has generated a large amount of interest among patent practitioners because of its potential impact on the ability to obtain and enforce patents claiming DNA and proteins. The holding in *Lilly* suggests that disclosing the amino acid sequence of a human protein and the DNA sequence encoding of the same protein found in one other species is not enough to qualify as an adequate description of the specific DNA encoding the human protein. Due to the degeneracy of the genetic code, one could hypothesize billions of possible DNA sequences which, based on the amino acid sequence, could encode a particular protein.¹⁴⁰ In addition, while some regions of a particular gene or cDNA may be conserved between species, some regions will be significantly

133. *See id.* at 1567.

134. *Id.*

135. *See id.* at 1567-68.

136. *Id.* at 1568.

137. *Id.* *See also In re Dileone*, 436 F.2d at 1404 (holding that a broadly claimed invention can be enabled but still not described sufficiently).

138. *Lilly*, 119 F.3d at 1567.

139. UC apparently argued during the prosecution of the '740 patent that the disclosure in the '525 patent did not enable the production of human insulin. *See id.* at 1572 & n.6.

140. *See WATSON ET AL.*, *supra* note 86, at 223.

different between even closely related species.¹⁴¹ Thus, without the claimed cDNA clone, it may be difficult or impossible to predict or describe a particular cDNA.¹⁴²

The factual record in the *Lilly* case further supports this reasoning. UC did not possess the human cDNA at the time of filing the '525 application.¹⁴³ In addition, UC actually sought to procure a separate patent later dealing with the human cDNA encoding insulin. During the prosecution of the later application, UC argued that the rat cDNA sequence did not render the human cDNA obvious. Thus, UC was in effect saying that the rat cDNA could not be used to adequately describe the human cDNA. A disclosure that does not at least render a claim obvious does not provide an adequate description supporting that claim. In fact, the *Lilly* court held that even if the disclosure would have made the invention obvious, this alone would still be insufficient to satisfy the written description requirement.¹⁴⁴ Furthermore, the court once again affirmed that claims to a specific DNA are not made obvious "by mere knowledge of a desired protein sequence and methods for generating the DNA that encodes the protein."¹⁴⁵

The *Lilly* court, however, did not make entirely clear what description is sufficient for a cDNA apart from disclosing the actual sequence of that DNA. Arguably, it is an overstatement of the court's holding to suggest that an inventor must provide the sequence of any DNA that is claimed in order to meet the written description requirement. The Federal Circuit has never explicitly stated that disclosing a cDNA sequence is the only way to satisfy the written description requirement.

The standard applied consistently in several cases is that the specification must describe the cDNA itself by disclosing the "structure, formula, chemical name, or physical properties" of the substance "sufficient to distinguish it from other molecules."¹⁴⁶ Unlike traditional chemical names which can say a lot about the structure of the molecule, the name "cDNA encoding X protein sequence" does not describe the structure of the cDNA.¹⁴⁷ This name cannot by itself be adequate as it would allow one to describe the molecule without ever achieving

141. The rat and human proteins vary in 14 amino acids and the cDNA varies in 48 bases in just the proinsulin portion of the molecule.

142. Because the genetic code tells a scientist what DNAs may potentially encode a specific protein, an applicant may be entitled to claim the large genus of cDNAs which encode the particular protein of interest even if it would consist of billions of molecules. A specific (naturally occurring) cDNA may not necessarily be described because, out of the billions of possible sequences encoding the protein of interest, the applicant has not described the particular DNA at issue.

143. *Lilly*, 119 F.3d at 1567-69.

144. *Id.* at 1567; *see also* *Lockwood v. American Airlines, Inc.*, 107 F.3d 1565, 1572 (Fed. Cir. 1997).

145. *Lilly*, 119 F.3d at 1567 (citing *In re Deuel*, 51 F.3d 1552, 1559 (Fed. Cir. 1995); *In re Bell*, 991 F.2d 781, 785 (Fed. Cir. 1993)).

146. *Lilly*, 119 F.3d at 1566, 1568; *see also* *Fiers v. Revel*, 984 F.2d 1164, 1171 (Fed. Cir. 1993).

147. *See Lilly*, 119 F.3d at 1568.

anything in the laboratory.

It may, however, be possible to disclose distinguishing physical properties of a cDNA without providing the actual sequence and still satisfy the written description requirement. For example, a cDNA could be described by its number of bases coupled with a detailed restriction map.¹⁴⁸ It might also be possible to identify or distinguish a particular DNA by disclosing the conditions under which this DNA hybridizes to a specific probe along with the sequence of that probe.¹⁴⁹

The USPTO issued a formal request for comments regarding an interim set of guidelines recently published.¹⁵⁰ These interim requirements represent the USPTO's view as to the information necessary to satisfy the written description requirement in light of recent case law. The guidelines state that other identifying characteristics such as "physical and/or chemical characteristics and/or functional characteristics coupled with a known or disclosed correlation between function and structure" may suffice.¹⁵¹ The guidelines also suggest that the "size, cleavage map, and source from which the DNA is derived" may satisfy the requirement.¹⁵²

Thus, the guidelines appropriately focus on whether the description somehow conveys to those skilled in the art that the inventor was in possession of what is being claimed. A description discussing a relationship between genes of different species such as rat and human genes or a discussion of the similarity between specific regions of those genes could possibly be an adequate description of the DNA encoding a specific protein in both of those species.¹⁵³ In addition, it may be possible for an inventor to possess enough information based on animal models to adequately describe a human cDNA and, thereby, be entitled to claim it. UC's '525 patent specification in *Lilly*, however, did not provide any of this information. It disclosed nothing with respect to any

148. Over 100 restriction enzymes have been isolated from various organisms. These enzymes cut DNA at specific nucleotide (base) sequences. Most recognize unique sequences of four to six nucleotides in length. For example, the restriction enzyme *EcoRI* recognizes and cuts the sequence GAATTC. Thus, digesting (cutting) DNA with a particular subset of these enzymes will result in DNA fragments of a defined length. How long the fragments are depends on the enzymes used and the particular sequence of that DNA. See WATSON ET AL., *supra* note 86, at 88-89.

149. See SAMBROOK ET AL., *supra* note 97.

150. PATENT AND TRADEMARK OFFICE, U.S. DEP'T OF COMMERCE, INTERIM GUIDELINES FOR THE EXAMINATION OF PATENT APPLICATIONS UNDER THE 35 U.S.C. § 112, PARA. 1 "WRITTEN DESCRIPTION" REQUIREMENT 2 (June 9, 1998), available at <<http://www.uspto.gov>> [hereinafter INTERIM GUIDELINES].

151. *Id.* at 10.

152. *Id.*

153. The development of bioinformatics is beginning to manage the increasing amount of genetic sequence information that is becoming available. Bioinformatics provides ways to analyze DNA and protein sequences and make predictions regarding structure or function relationships. See ANDREAS D. BAXEVANIS & B.F. OUELLETTE, BIOINFORMATICS: A PRACTICAL GUIDE TO THE ANALYSIS OF GENES AND PROTEINS (1st ed. 1998).

relationship between the cDNA encoding rat insulin and the cDNA encoding human insulin.¹⁵⁴ It is clear that UC did not have any information regarding the human sequence because it had not been cloned at the time of the '525 filing.

Even though the Federal Circuit has not explicitly stated that the actual sequence of a gene must be disclosed in order to claim that gene and the recent USPTO guidelines suggest alternative ways to describe a gene or protein, commentators and patent practitioners have suggested that disclosing the complete sequence may be the only way to adequately describe a cDNA or protein.¹⁵⁵ In *Lilly* the court stated that, "[a] cDNA . . . requires a kind of specificity usually achieved by means of the recitation of the sequence of the nucleotides that make up the cDNA."¹⁵⁶ "Some patent experts think the [*Lilly*] decision could have a broad impact, compelling gene hunters to spell out the exact sequence of all the DNA they hope to claim, rather than just the function of the genes."¹⁵⁷

Whether this proves to be the case or not, many would argue that the courts appear to be singling out biotechnology inventions by applying a heightened standard for the written description requirement. In light of prior case law, however, the Federal Circuit is not singling out inventions claiming DNA sequences. The federal courts have applied a similar standard for chemical inventions as well as other types of inventions which encompass unpredictable arts.¹⁵⁸

Courts have limited the scope of claims for inventions dealing with the unpredictable arts. This has the effect of preventing inventors in those fields from obtaining broad property rights. One skilled in the chemical and biological arts cannot always reasonably predict how different chemical compounds might behave.¹⁵⁹ In these types of cases, the claims are limited by the scope of what the

154. See *Regents of the Univ. of Cal. v. Eli Lilly & Co.*, 119 F.3d 1559, 1567-69 (Fed. Cir. 1997).

155. See Eliot Marshall, *Courts Take a Narrow View of UC's Claims*, 277 SCI. 1029 (1997).

156. *Lilly*, 119 F.3d at 1568.

157. Marshall, *supra* note 155, at 1029; see also Dorothy R. Auth, *Are ESTs Patentable?*, 15 NATURE BIOTECHNOLOGY 911, 912 (1997) (stating that the *Lilly* decision "suggests that the new standard for the written description requirement—at least in the courts—may well be that sequences claimed must be provided in the specification").

158. See, e.g., *In re Smith*, 458 F.2d 1389, 1395 (C.C.P.A. 1972) (holding that "it cannot be said that . . . a subgenus is necessarily always implicitly described by a genus encompassing it and a species upon which it reads"); *In re Ahlbrecht*, 435 F.2d 908, 912 (C.C.P.A. 1971) (disclosing a species in a foreign application was insufficient to support claims to broader group including the species).

159. See *Nationwide Chem. Corp. v. Wright*, 458 F. Supp. 828, 839 (M.D. Fla. 1976). See also *Schering Corp. v. Gilbert*, 153 F.2d 428, 433 (2d Cir. 1946) ("organic chemistry is essentially an experimental science and results are often uncertain, unpredictable, and unexpected"); *Ex parte Sudilovsky*, 21 U.S.P.Q.2d 1702, 1705 (Bd. Pat. App. & Interf. 1991) (finding an invention which concerned pharmaceutical activity to be relatively unpredictable because there was no record of analogous activity for similar compounds).

disclosure reasonably teaches to one skilled in the art.¹⁶⁰ A slight change in the structure or composition of a chemical compound can have an unexpected dramatic effect on its properties. Thus, courts have closely scrutinized the disclosure in chemical cases.

The courts and the USPTO also consider biotechnology to be an unpredictable art.¹⁶¹ A degree of trial and error is normally required before a molecular biologist can know which applications of a given strategy will succeed. Thus, the disclosure in these types of cases is more often an issue. In addition, the court in the leading case, *Amgen, Inc. v. Chugai Pharmaceutical Co.*,¹⁶² classified DNA as a complex chemical suggesting that chemical case law precedent will be applied rather than precedent dealing with other types of biological compounds.¹⁶³

The predictability of the art is often considered in the context of the enablement requirement in 35 U.S.C. § 112(1).¹⁶⁴ This follows because with unpredictable technology, more information is needed to enable one skilled in the art to make and use the invention. A similar argument can be made for the written description requirement because it also requires an evaluation of the state of the art. The USPTO suggests that “[t]here is an inverse correlation between the level of predictability in the art and the amount of disclosure necessary to satisfy the written description requirement.”¹⁶⁵ The standard is whether the written description is adequate to convey to other *skilled practitioners* that the applicant was in possession of the invention at the time of filing.¹⁶⁶ Thus, the stringency of the written description requirement should also increase with the unpredictability of the art.

In patent cases, the state of the art is determined at the time of filing, not at the time of subsequent court proceedings.¹⁶⁷ Thus, in *Fiers* and *Lilly*, the predictability of the technology was assessed as of the late 1970s.¹⁶⁸ In addition, the issue of compliance with the written description requirement is highly fact-

160. See *Nationwide*, 458 F. Supp. at 839.

161. See, e.g., *In re Goodman*, 11 F.3d 1046, 1051 (Fed. Cir. 1993) (acknowledging articles showing great unpredictability in the art); *Ex parte Hitzeman*, 9 U.S.P.Q.2d 1821, 1823 (Bd. Pat. App. & Interf. 1988) (“case involves highly unpredictable factors including unique, delicate, and unpredictable biochemical and genetic actions”).

162. 927 F.2d 1200, 1206 (Fed. Cir.), *cert. denied*, 502 U.S. 856 (1991).

163. See, e.g., *In re Fisher*, 427 F.2d 833, 837-39 (C.C.P.A. 1970) (finding the written description requirement satisfied by the disclosure of a protein having specific and known biological function, without any description of its chemical structure that was unknown).

164. See, e.g., *In re Wands*, 858 F.2d 731, 735 (Fed. Cir. 1988).

165. INTERIM GUIDELINES, *supra* note 150, at 6.

166. See *Regents of the Univ. of Cal. v. Eli Lilly & Co.*, 119 F.3d 1559, 1566 (Fed. Cir. 1997).

167. See *In re Wright*, 999 F.2d 1557, 1562-63 (Fed. Cir. 1993).

168. In *Lilly*, UC cloned the rat cDNA encoding insulin in 1977. *Lilly*, 119 F.3d at 1562. In *Fiers v. Revel*, inventors were relying on priority to claims filed in March 1980 and November 1979. 984 F.2d 1164, 1167 (Fed. Cir. 1993).

specific.¹⁶⁹ Courts have suggested that broadly articulated rules setting forth a standard for fulfillment of the written description requirement are inappropriate.¹⁷⁰ The CCPA stated in *In re Driscoll*¹⁷¹ that the precedential value of written description cases is extremely limited. Because scientific technology is always rapidly changing, the law has generally adapted to keep pace with the science. Thus, the written description guidelines proposed by the USPTO may be of limited value with respect to predicting whether a court will uphold the validity of a patent issued under those guidelines.

As biotechnology has advanced, it has become increasingly routine to probe a cDNA library and clone a gene. It may be possible to distinguish *Lilly* by arguing that the written description becomes easier to satisfy as the state of knowledge advances in the field. Generally, a partial amino acid sequence of a protein is enough to design a probe and clone the cDNA encoding that protein.¹⁷² Thus, it is possible that a disclosure similar to that provided in the UC '525 patent would, today, be enough to convey to those skilled in the art that UC was, for all practical purposes, in possession of the full-length gene.

While the level of skill in the art and the predictability of the technology are important considerations in deciding sufficiency of disclosure issues, courts are most likely to give those considerations the most weight when dealing with questions of enablement or obviousness.¹⁷³ A separate written description requirement exists in part because of the policy consideration of preventing overreaching by the patentee.¹⁷⁴ Thus, a strong argument can be made that the predictability of the technology should not impact the written description requirement, because one skilled in the art does not necessarily know any more about the structure of a particular DNA even if cloning that DNA would be considered routine.

A patent resulting from applications with prophetic teachings¹⁷⁵ might be issued before significant experimental work had been conducted. Thus, courts have attempted to limit these types of claims. "[A] patent 'is not a reward for the search, but compensation for its successful conclusion.'"¹⁷⁶ The *Amgen, Fiers*,

169. See *Vas-Cath, Inc. v. Mahurkar*, 935 F.2d 1555, 1562 (Fed. Cir. 1991).

170. See *In re Wertheim*, 541 F.2d 257, 263 (C.C.P.A. 1976).

171. 562 F.2d 1245, 1250 (C.C.P.A. 1977).

172. See *SAMBROOK ET AL.*, *supra* note 97, at § 8.49.

173. See generally *In re Deuel*, 51 F.3d 1552 (Fed. Cir. 1995); *In re Bell*, 991 F.2d 781 (Fed. Cir. 1993); *In re Wands*, 858 F.2d 731 (Fed. Cir. 1988).

174. The written description requirement "guards against the inventor's overreaching by insisting that he recount his invention in such detail that his future claims can be determined to be encompassed within his original creation." *Vas-Cath*, 935 F.2d at 1561.

175. Prophetic claims are problematic in that often an applicant will seek to preempt future developments in a particular field. However, if an applicant discloses a particular invention sufficiently then he or she can obtain a patent without ever reducing the invention to practice. See *supra* note 66 and accompanying text.

176. *In re Ziegler*, 992 F.2d 1197, 1203 (Fed. Cir. 1993) (quoting *Brenner v. Manson*, 383 U.S. 519, 536 (1966)).

and *Lilly* decisions promote the policy of disclosing inventions, not research plans. Requiring inventors to have more than an idea regarding the existence of a compound prevents them from filing before they have actually invented.¹⁷⁷

The Federal Circuit, without expressly stating it, seems to require proof in the specification that the gene has actually been cloned at the time of filing. The *Amgen* court, discussing the conception of a gene, stated that “when an inventor is unable to envision the detailed constitution of a gene so as to distinguish it from other materials, as well as a method for obtaining it, conception has not been achieved until reduction to practice has occurred, i.e., until after the gene has been isolated.”¹⁷⁸ In *Fiers*, the court stated, “[i]f conception of a DNA requires a precise definition . . . then a description also requires that degree of specificity.”¹⁷⁹ In addition, the court reaffirmed in *Lilly* that the description is required to clearly convey that the inventor invented what is claimed at the time of filing.¹⁸⁰ These statements suggest that the specification must set forth positive proof that the cDNA being claimed has been cloned.

Therefore, because of the policy concern to prevent overreaching by the inventor and the court’s statements regarding proof of possession, courts may not retreat from applying a stringent written description standard for inventors claiming DNA sequences, even though the technology has changed significantly since the 1970s. However, because of the fact-sensitive nature of the written description requirement, it is unclear whether the holding in *Lilly* will have a broad impact on other types of claims involving DNA sequences.

One particularly controversial type of claim is a “hybridization claim.” An applicant using a hybridization claim, claims not only a specific DNA, but anything that hybridizes to that DNA under high stringency conditions.¹⁸¹ Thus,

177. See *Regents of the Univ. of Cal. v. Eli Lilly & Co.*, 119 F.3d 1559, 1566 (Fed. Cir. 1997) (“To fulfill the written description requirement, a patent specification must describe an invention and do so in sufficient detail that one skilled in the art can clearly conclude that ‘the inventor invented the claimed invention.’”) (quoting *Lockwood v. American Airlines, Inc.*, 107 F.3d 1565, 1572 (Fed. Cir. 1997)); *Fiers v. Revel*, 984 F.2d 1164, 1168 (Fed. Cir. 1993) (finding that “Fiers’ disclosure of a method for isolating the DNA of the count . . . did not establish conception, since ‘success was not assured or certain until the [β -IF] gene was in fact isolated and its sequence known’”); *Amgen, Inc. v. Chugai Pharm. Co.*, 927 F.2d 1200, 1206 (Fed. Cir. 1991) (“[W]hen an inventor is unable to envision the detailed constitution of a gene so as to distinguish it from other materials, as well as a method for obtaining it, conception has not been achieved until reduction to practice has occurred, i.e., until after the gene has been isolated.”).

178. *Amgen*, 927 F.2d at 1206.

179. *Fiers*, 984 F.2d at 1171.

180. *Lilly*, 119 F.3d at 1566.

181. DNA is typically a double-stranded molecule. Each strand is a complement of the other and the strands are joined together by hydrogen bonds between complementary bases (i.e., A=T, G=C). See WATSON et al., *supra* note 86, at 225. If the DNA is denatured (by heating), hydrogen bonds are broken, and the DNA becomes single stranded. If a probe has complementary bases to one of the denatured strands, it will hybridize specifically to it. See *id.* at 243. High stringency conditions are employed to prevent non-specific hybridization from occurring: Allowing the

the applicant is attempting to claim DNA sequences related to, but not identical to, the sequence that has been actually cloned. If this kind of claim is valid, a patentee potentially could be entitled to protection for an entire family of related genes, even though only a single gene or part of a single gene has actually been cloned.

DNA patent applications often seek protection for cDNAs associated with "expressed sequence tags" ("ESTs"). ESTs are partial cDNA sequences (usually 150 to 400 base pairs long) which are obtained by randomly selecting clones from a human cDNA library and partially sequencing them.¹⁸² Often, a scientist in possession of an EST will attempt to claim not only the EST itself, but also the full-length gene that encompasses the EST as well as other related genes which will hybridize to the EST under specified stringency conditions.¹⁸³ The USPTO has issued at least one patent prior to the patent in *Lilly* with this type of claim.¹⁸⁴

Patent applications involving ESTs or other partial cDNAs present two questions with respect to the written description requirement:¹⁸⁵ (1) whether an adequate written description can be provided for claims to DNA which hybridize to the EST; and (2) whether an adequate written description can be provided for a full-length gene which encompasses an EST when that DNA or gene has not yet been cloned. Arguably, both situations can be distinguished from the *Lilly* case. Unlike the UC claims in the '525 patent, sequence information is disclosed that provides a starting point for the claims to DNA that hybridize to and/or encompass that sequence. Any subsequent clones obtained using the EST disclosed will have a sequence based on and homologous to that EST. Thus, similar to claims encompassing a genus of nucleic acids based on a protein sequence, one skilled in the art could envision a large number of species based on the initial structure disclosed.

In *Lilly*, it was unknown whether the human cDNA encoding insulin claimed

cloning of a specific piece of DNA picked up from a specific hybridization reaction. Hybridization can occur even if there are mismatches between the probe sequence and a DNA sequence in the library. Thus, a probe can be used not only to clone the DNA encompassing it but also related DNA that may have homology to the original DNA of interest. See CURRENT PROTOCOLS IN MOLECULAR BIOLOGY §§ 6.0.1-6.4.1 (Federick M. Ausubel et al. eds., 1990) (discussing screening of recombinant DNA libraries and the use of synthetic oligonucleotide probes in hybridization reactions). The claim, "[a]n isolated DNA probe for detecting HIV-X, wherein said DNA probe hybridizes to the nucleotide sequence set forth in SEQ ID NO:1 under the following conditions: hybridization in 7 % sodium dodecyl sulfate (SDS), 0.5 M NaPO₄ pH 7.0, 1 mM EDTA at 50° C; and washing with 1 % SDS at 42° C" is an example of the type of scope the USPTO is willing to allow. INTERIM GUIDELINES, *supra* note 150, at 13.

182. See Eisenberg & Merges, *supra* note 2, at 2.

183. A claim using "comprising language" is open-ended and would include not only the EST itself, but potentially a larger full-length gene that encompasses that EST. See Auth, *supra* note 157, at 911.

184. See Lorrie Daggett et al., U.S. Patent No. 5,521,297, issued May 28, 1996.

185. See Eisenberg & Merges, *supra* note 2, at 1 (discussing other patentability issues in addition to the written description requirement with respect to claims involving ESTs).

by UC would hybridize to the rat cDNA encoding insulin. UC investigators did not claim DNA which hybridizes to the rat DNA. Instead, they claimed the rat and human cDNAs and assumed that the rat cDNA was representative of (or at least homologous to) the human cDNA.¹⁸⁶ However, it is clear that the human cDNA itself does not encompass the entire rat cDNA.

A broader reading of *Lilly*, however, would seem to limit hybridization or EST claims. The CCPA has held that it is not necessary for an inventor to test all the embodiments of his invention, but it is necessary for the specification to allow "one skilled in the art" to recognize the compounds that the inventor has actually invented.¹⁸⁷ Further, *Lilly* appears to require that the inventor have possession of the claimed subject matter to establish that he or she actually invented what is claimed.¹⁸⁸ Thus, a specification must have enough of a written description "to provide guidance to the skilled artisan as to the hundreds or thousands of compounds that are potentially encompassed by the hybridization claim."¹⁸⁹

Although an EST provides a starting point through a disclosure of that sequence, it is difficult to see how an inventor could even begin to describe or conceptualize the characteristics for the full-length gene encompassing the EST or furthermore, anything that the EST may hybridize to. In addition, the Federal Circuit's concern for the overreaching inventor would apply to these claims to an even greater degree than UC's claims to the human cDNA encoding insulin in *Lilly*.

The specific limits on the ability of an inventor to assert broad claims based on the discovery of a single gene described in *Lilly* could similarly apply to EST claims.¹⁹⁰ In discussing genus and species claims, the *Lilly* court acknowledged consistent patent law requiring an inventor to name more than one species to provide a proper basis for claims to an entire group.¹⁹¹ The *Lilly* court was concerned with UC's claims to all mammalian and vertebrate cDNAs encoding insulin based only on the written description of the rat insulin gene.¹⁹² If the description of a single species does not describe an entire group encompassing that species, then similarly a description of a single EST may not be sufficient to describe a larger group that may hybridize or encompass that EST.

It is unclear how broadly the courts will apply the *Lilly* decision. The USPTO has attempted to provide broad guidelines consistent with Federal Circuit

186. *Regents of Univ. of Cal. v. Eli Lilly & Co.*, 119 F.3d 1559, 1568-69 (Fed. Cir. 1997).

187. *See In re Angstadt*, 537 F.2d 498, 502 (C.C.P.A. 1976) (discussing the unpredictability of the chemical art and the standard for disclosure with respect to the determination of claims which may work to produce hydroperoxides and those which do not).

188. *Lilly*, 119 F.3d at 1566.

189. *Auth*, *supra* note 157, at 912.

190. *Lilly*, 119 F.3d at 1568.

191. *Id.* at 1569; *see also In re Grimme*, 274 F.2d 949, 952 (C.C.P.A. 1960); M.P.E.P. §§ 804.06(a)-(j) (6th ed. 1995 & Supp. 1997) (discussing genus and species claims).

192. *Lilly*, 119 F.3d at 1568-69.

precedent.¹⁹³ The rapid advancement of biotechnology coupled with the complexity of nucleic acids and the level of unpredictability in the art makes it difficult, however, to predict what will happen once hybridization claims and other broadly asserted claims are challenged in the courts.

VIII. IS THE *LILLY* DECISION CONSISTENT WITH OVERARCHING PATENT LAW POLICIES?

To conform to the constitutional requirement of promoting the progress of science and the useful arts, the patent system seeks to encourage innovation by rewarding individuals with the right to exclude others from practicing their inventions for a set period.¹⁹⁴ The inventor, however, is only granted this right to exclude if he or she fully discloses the invention to the public. This inducement to disclose aids in the rapid dissemination of information to the public so that the technology can be improved and built upon.

In one sense, the Federal Circuit's stringent written description requirement for DNA inventions seems to be at odds with this goal by actually harming an inventor who has made the initial important discovery. The CCPA, in a chemical case, stated, "[a]s pioneers . . . they would deserve broad claims to the broad concept. What were once referred to as 'basic inventions' have led to 'basic patents,' which amounted to real incentives, not only to invention and its disclosure, but to its prompt, early disclosure."¹⁹⁵ Thus, in the case of claims to a gene, an inventor working with animal models might delay initial disclosure until he or she had actually cloned the human gene as that gene is the one which most likely will have therapeutic and commercial value.¹⁹⁶ In addition, permitting an inventor to assert broad claims, without the investment of actually making the invention, allows an inventor with limited resources to effectively compete in the biotechnology industry.

A more compelling argument, however, suggests that these types of prophetic claims must be limited because of the need to protect the public from the overreaching patentee.¹⁹⁷ Allowing an inventor to claim more than he has actually invented potentially has an even greater detrimental effect on the advancement of technology. Broadly asserted claims based on the discovery of a single gene have the potential to block off entire areas of research and development. The Cohen-Boyer patent on recombinant DNA technology had the potential to slow the development of commercial biotechnology to a crawl.¹⁹⁸

193. INTERIM GUIDELINES, *supra* note 150.

194. See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 151 (1989).

195. *In re Koller*, 613 F.2d 819, 824 (C.C.P.A. 1980).

196. See Brief of Appellant at 9, *Regents of the University of California v. Eli Lilly & Co.*, 119 F.3d 1559 (Fed. Cir. 1997) (No. 96-1175).

197. Response Brief of Appellee to Petition for Rehearing at 1, *Regents of the University of California v. Eli Lilly & Co.*, 119 F.3d 1559 (Fed. Cir. 1997) (No. 96-1175).

198. See Philippe Ducor, *Are Patents and Research Compatible?*, 387 NATURE 13 (1997). The Cohen-Boyer patent is assigned to Stanford University. *Id.*

Similarly, allowing investigators to claim entire groups of genes based on a single discovery may have the effect of slowing down the progress of science and technology. In a discussion of EST claims, patent practitioners expressed concern that allowing broad claims “would be strong disincentive for further investment in the biotechnology industry.”¹⁹⁹

This point is clearly illustrated by considering how a decision to uphold the validity of UC’s patent in *Lilly* would affect obviousness law. Of the three major requirements that an invention must satisfy (utility, novelty, and nonobviousness), the nonobviousness hurdle is often the most difficult to meet.²⁰⁰ The court, in *Lilly*, stated “a description that does not render a claimed invention obvious does not sufficiently describe that invention for purposes of 35 U.S.C. § 112, ¶ 1.”²⁰¹ Thus, the *Lilly* court was saying that a disclosure of the rat insulin gene along with the rat and human insulin proteins does not make the human gene obvious. Had the court determined alternatively that UC’s description rendered the human gene obvious, all other researchers who might subsequently clone a gene and corresponding protein from other species would be effectively blocked from obtaining patents on those molecules. Under this hypothetical ruling, an inventor could plausibly argue that homologous genes and proteins present in other species as well as any functional variant were obvious once a single gene and corresponding protein had been discovered. To avoid such a profound effect on the patentability of such a broad number of potential compounds, the *Lilly* court could not reasonably find that the ‘525 specification satisfied the written description requirement.

A recent article describes the decision in *Lilly* as “an unmitigated disaster that if followed, has the potential for causing untold havoc in the biotechnology field.”²⁰² However, it would seem that the holding in *Lilly* actually avoided a disaster that would have crippled the biotechnology industry. The enormous amount of time and money companies spend to study DNA and protein variants, to clone homologous genes and protein family members, and to mine databases would no longer be justified had the court found the written description in ‘525 adequate.

Through application of the written description requirement, courts can distinguish between claims to technologies that are too broad or basic to justify patent protection, and those dealing with other types of technologies that are

199. Auth, *supra* note 157, at 911.

200. See 35 U.S.C. § 103 (1994 & Supp. II 1996). To make out a case of obviousness, one must: (1) determine the scope and content of the prior art; (2) ascertain the differences between the prior art and the claims in issue; (3) determine the level of skill in the pertinent art; and (4) evaluate any evidence of secondary considerations. See *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966). See also Kenneth G. Chahine, *Building the Proper Foundation for Genomics-Based Patents*, 16 NATURE BIOTECHNOLOGY 683 (1998) (discussing the “crumbling obviousness standard” for DNA-related patents).

201. *Lilly*, 119 F.3d at 1567.

202. Harris A. Pitlick, *The Mutation on the Description Requirement Gene*, 80 J. PAT. & TRADEMARK OFF. SOC’Y 209, 222 (1998).

more predictable and may justify broader protection. Thus, the Federal Circuit has decided that the uniqueness of biotechnology inventions claiming DNA sequences requires the application of a stringent written description requirement to protect the public from inventors seeking to slow the pace of research by preempting future developments before they arrive.

CONCLUSION

The application of the written description requirement to biotechnology inventions claiming DNA sequences is an exciting area of patent law that remains unsettled after *Lilly*. The uncertainty in this area stems from the necessity that the law continually adapt to keep pace with science. Recombinant DNA technology was still in its infancy when the University of California filed its first patent application on the human insulin gene. This technology, however, has changed considerably over the past twenty years to the point where cloning a gene is considered routine. In addition, the courts have consistently emphasized the fact-specific nature of issues involving the written description requirement.

The Federal Circuit's emphasis on the written description requirement, however, is likely to continue. In the *Lilly* case, the court did not focus on the state of the art or the predictability of the technology.²⁰³ The *Lilly* court was most concerned with limiting claims to DNA sequences actually invented at the time of filing. The problem of the overreaching inventor is and will continue to be particularly acute for inventions involving DNA and protein molecules. Thus, it is unlikely the courts will retreat from a stringent application of the written description requirement for these types of inventions in the near future.

203. See *supra* notes 131-39 and accompanying text.

LIMITS ON THE ABILITY TO DISCIPLINE DISABLED SCHOOL CHILDREN: DO THE 1997 AMENDMENTS TO THE IDEA GO FAR ENOUGH?

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INTRODUCTION

School districts around the country often are torn between duties of educating children with disabilities and maintaining a safe environment for all children, teachers, and administrators. The guarantees of the Individuals with Disabilities Education Act ("IDEA")¹ demand this double-duty. The purpose of the IDEA is to provide free appropriate public education to all children with disabilities.² However, there has been considerable debate in the courtroom and among the general public over how to interpret certain provisions of the IDEA, in light of the growing discipline and safety concerns in public schools.

Since Congress enacted the IDEA in 1975,³ violence and discipline problems in schools have risen dramatically.⁴ In fact, statistics show that juvenile arrests for both murder and aggravated assault have increased by 100% since 1975, and the number of students arrested for possession of weapons has risen almost 200% since that time.⁵ Meanwhile, the number of disabled children in public schools has also risen, due to the guarantees of the IDEA⁶ and the extensive broadening

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1. 20 U.S.C. §§ 1400-910 (1994 & Supp. II 1996).

2. *See id.* § 1400(d)(1)(A). Prior to enactment of the IDEA, more than half of the children with disabilities in the United States were not receiving appropriate educational services. *See id.* § 1400(c)(2)(B).

3. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (originally enacted as Education of the Handicapped Act, Pub. L. No. 91-230, § 601, 84 Stat. 175 (1970)).

4. *See Disability and Discipline*, NEW ORLEANS TIMES-PICAYUNE, May 19, 1997, at B4. *See also* Fact Sheet 2 on Juvenile Justice Event, The White House Office of the Press Secretary, June 12, 1997 (reporting that the number of juveniles who kill with guns has quadrupled since 1984, making youth violence a high priority for the Clinton Administration); *Goal Seven: Safe Schools Tighten Up On Discipline: A Cry From the Field*, 7 AM. POL. NETWORK DAILY REP. CARD, Apr. 18, 1997 [hereinafter *Safe Schools*]. This article reported the release of a 1997 survey by the National Association of Elementary School Principals, which stated that 60% of those polled said strict adherence to zero tolerance policies for weapons and drugs result in significantly increased numbers of suspensions, while 95% said those regulations are necessary for maintaining school safety. "The results of this survey make it very clear that the safety and well-being of children is the school principal's number one priority." *Id.*

5. *See* Aaron D. Rachelson, *Expelling Students Who Claim to be Disabled: Escaping the Individuals with Disabilities Act's "Stay-Put" Provision*, 2 MICH. L. & POL'Y REV. 127, 134 & n.40 (1997).

6. Up to 10% of the students enrolled in public schools are classified as disabled. *See*

of conditions that are covered under the act.⁷ According to U.S. Department of Education estimates, there were “roughly 5.4 million disabled school-aged children in the [United States] in 1996. . . . The rise of violence, drugs and weapons in public schools has been accompanied by an increase in the number of disabled school children engaging in such violent behavior.”⁸ For example, the New York City teachers’ union stated that one half of the 4712 criminal “incidents” committed against its teachers in 1996 were committed by special education students.⁹

In 1997, Congress passed several revisions to the IDEA,¹⁰ some of which gave schoolteachers and administrators more discretion in disciplining disabled students who bring weapons or drugs to school.¹¹ However, the question remains, do these amendments go far enough, too far, or strike just the right balance?

This Note discusses why the IDEA’s guarantee to free appropriate public education is necessary. It first examines the relevant text and history of the IDEA in its original form. It also walks through the discipline debates that followed enactment of the IDEA, including relevant case law and other commentary. Next, this Note discusses the 1997 amendments to the IDEA that relate to the disciplinary measures. The following section examines public reaction to the revisions, of which there are many both positive and negative. In particular, this section attempts to answer the question of whether the 1997 revisions go far enough, or too far, in allowing schools to discipline handicapped children, concluding that the extensive amendments highlight the extent to which the IDEA really does over-exempt disabled students from fair punishment. Finally, this Note discusses the numerous problems left unsolved for schools and explores the possible future of this debate.

I. BACKGROUND OF THE IDEA

The IDEA has undergone many changes since its enactment, not all of them related to discipline.¹² In fact, the disciplinary procedures included in the IDEA stem from the original need to prevent school districts from excluding children

Disability and Discipline, *supra* note 4.

7. See *id.*; see also *infra* notes 29-32 and accompanying text.

8. *Double Standard: A New Law Empowered School Officials to Deal with Disabled Students Who are Discipline Problems Doesn’t Go Far Enough*, THE VIRG.-PILOT & LEDGER-STAR, May 16, 1997, at B10 [hereinafter *Double Standard*].

9. See June Kronholz, *Educators Say Proposed Law Boosting Ability to Punish Disabled Kids Doesn’t Go Far Enough*, WALL ST. J., May 14, 1997, at A24 (quoting the United Federation of Teachers). The article defines criminal “incidents” as “assaults, sex offenses, robbery.”

10. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 (codified at 20 U.S.C.A. §§ 1400-910 (West Supp. 1998)).

11. *Id.* § 101, 111 Stat. at 93-94.

12. See *infra* notes 78-80 and accompanying text.

with disabilities, which many did customarily before the IDEA became law.¹³

A. Pre-IDEA Case Law

Two major court cases in the early 1970s prompted Congress to promulgate the IDEA. The first case, *Mills v. Board of Education*,¹⁴ involved seven children who were excluded from public schooling by the District of Columbia Board of Education.¹⁵ The children ranged in age from eight to sixteen years old and had been classified as a “behavior problem,” “retarded,” “brain-damaged and hyperactive” or other combination of disabilities.¹⁶ All seven children had been excluded from various public schools without a full hearing or a timely and adequate review of their status.¹⁷ The school board argued that it was financially impossible to provide the services without significant assistance from Congress. However, the U.S. District Court for the District of Columbia held that whatever funds were available “must be expended equitably in such a manner that no child is entirely excluded from publicly supported education consistent with [the child’s] needs and ability to benefit therefrom.”¹⁸ In addition, the court explained that due process of law required a hearing before children who had been labeled as disabled could be suspended or expelled from regular schooling in publicly supported schools or specialized programs.¹⁹ Anything less, the court ruled, would violate constitutional guarantees of equal protection and due process.²⁰ In the end, the court required that the school system follow many of the same guidelines and procedures later adopted by Congress in the IDEA.²¹

Similarly, in *Pennsylvania Ass’n for Retarded Children v. Pennsylvania*,²² thirteen mentally disabled children claimed they were excluded from public schools because of their disability.²³ That state previously had adopted statutes

13. See Joan Beck, *Congress Misses Point on Helping Disabled Children*, CHI. TRIB., May 18, 1997, at 23.

14. 348 F. Supp. 866 (D.D.C. 1972).

15. The plaintiffs estimated that there were “22,000 retarded, emotionally disturbed, blind, deaf, and speech or learning disabled children, and perhaps as many as 18,000 of these children [were] not being furnished with programs of specialized education.” *Id.* at 868. The Department of Health, Education and Welfare reported that “the District of Columbia Public Schools admitted that an estimated 12,340 handicapped children were not to be served in the 1971-72 school year.” *Id.* at 869.

16. *Id.* at 869-70.

17. See *id.*

18. *Id.* at 876.

19. *Id.* at 875.

20. *Id.* at 874-75.

21. See generally *id.* at 880 (holding that the defendants must provide notice to the parents of any child who is to be placed in an alternative educational setting and the child and parents have the right to a hearing should they object to any such placement).

22. 343 F. Supp. 279 (E.D. Pa. 1972).

23. *Id.* at 281-82.

that relieved the State Board of Education from any obligation to educate a child who was deemed uneducable and untrainable by a public school psychologist.²⁴ Plaintiffs contended that their exclusions were based on those statutes and that such provisions were unconstitutional, as they violated due process of the law by failing to require a prior hearing and lacked equal protection by excluding retarded children without basis for support.²⁵ The court agreed.²⁶

These cases demonstrate that some schools were excluding children with disabilities. The courts noticed this practice of exclusion and ordered corrective measures. Perhaps a need to mandate changes in the education, or lack thereof, of disabled children helped to raise awareness among the general public and lawmakers. This need for change set the stage for the IDEA, which Congress passed three years after *Pennsylvania Ass'n for Retarded Children*.

B. 1975—Congress Enacts the IDEA

These court battles only touched the surface of the problem disabled children faced in receiving proper education. In 1975, when Congress enacted the Individuals with Disabilities Education Act, it found that the special education needs of children with disabilities were not being met.²⁷ In fact, before the enactment, one of every eight disabled children was excluded from the public school, and many others were “‘warehoused’ in special classes” or ignored until of age to drop out of school.²⁸ The meaning of disabled under the IDEA has changed significantly since that time and now includes the following conditions: mental illnesses, mental retardation, learning disabilities, serious emotional disturbances, chronic health problems, physical impairments, hearing impairments and deafness, speech impairments, visual impairments, and blindness.²⁹ Congress began expanding its definition of disabled under the IDEA

24. See *id.* at 282. In addition, the statutes allowed “indefinite postponement of admission to public school of any child who had not yet attained the mental age of five years.” *Id.* Pennsylvania law also defined the compulsory school age as eight to seventeen years; however, in practice, it had been used to delay admitting retarded children until age eight or remove them from public schools at age seventeen. See *id.*

25. See *id.* at 283.

26. *Id.* at 302. The court approved a Consent Agreement created by both parties. The agreement provided, among other things, that because the state of Pennsylvania provided public education for all children between the ages of six and twenty-one, it was also obligated to provide free, public education and training appropriate for mentally retarded children. *Id.* at 285.

27. See Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 3, 89 Stat. 773, 774.

28. *Honig v. Doe*, 484 U.S. 305, 309 (1988).

29. 20 U.S.C.A. § 1401(3) (West Supp. 1998). Originally the act defined a disabled child as “mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, crippled, or other health impaired children who by reason thereof require special education and related services.” Education of the Handicapped Act, Pub. L. No. 91-230, § 602(1), 84 Stat. 175, 175.

in 1983 when it replaced the term “speech impaired” with the broader term “speech and language impaired.”³⁰ The dissenting view on the amendment clearly feared vague terms and provisions would lead to “over-classification” of some children.³¹ Congress again expanded the conditions included under the IDEA in 1990 when it added autism and “traumatic brain injury,” although that disability looks to be a category of its own, covering impairment of such skills as memory, attention, judgment, problem-solving, motor abilities, and information processing.³²

Before enactment of the IDEA in 1975, Congress found that one million children with disabilities were entirely excluded from public school systems and did not have the same educational process as their peers.³³ After twenty-two years of the IDEA, seventy to eighty percent of disabled children are now educated in regular classrooms.³⁴ Mainstreaming disabled students gives them not only the same educational opportunities as their peers, but hopefully the same social opportunities as well.

Originally entitled the Education for All Handicapped Children Act, the IDEA sets out requirements for states to receive education grants.³⁵ According to the IDEA, in order for states to become eligible for grant funds, they must provide a “free appropriate public education”³⁶ to all children with disabilities in that state through specific procedures and protections spelled out in the IDEA.³⁷ To the maximum extent possible and appropriate, the education and related services are to be provided in a setting that allows the disabled child to be educated with children who do not have disabilities.³⁸ This educational setting is called the least restrictive environment.³⁹

One provision of the IDEA mandates that a student must remain in his or her current education program unless a change is mutually agreed to by the family and school officials.⁴⁰ This is referred to as the “stay-put” provision.⁴¹ Certain procedural safeguards guarantee that parents can prevent removal of their child

30. H.R. REP. 98-410, at 18 (1983), *reprinted in* 1983 U.S.C.C.A.N. 2088, 2105-06.

31. *Id.* at 92, 1983 U.S.C.C.A.N., at 2131.

32. H.R. REP. NO. 101-544, at 4-5 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1723, 1726-27.

33. 20 U.S.C. § 1400 (1994).

34. *See Disability and Discipline*, *supra* note 4.

35. 20 U.S.C.A. § 1411(a)(1) (West Supp. 1998).

36. A free appropriate public education, is defined as a special education and related services that “(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and (D) are provided in conformity with [an] individualized education program.” *Id.* § 1401(8).

37. *Id.* § 1412.

38. *See id.* § 1412(a)(5).

39. *See id.*

40. *Id.* § 1415(j).

41. *See e.g.*, *Honig v. Doe*, 484 U.S. 305, 308 (1988).

from his or her current placement.⁴² These safeguards include: (1) the opportunity for parents to examine all of the records relating to their disabled child and to participate in any meetings regarding the identification, evaluation and educational placement of that child, and the provision of a free appropriate public education for that child;⁴³ (2) mandatory written prior notice to the parents of the child whenever the school proposes to or refuses to initiate or change that identification, evaluation or educational placement;⁴⁴ (3) an opportunity for the parents of the child to present complaints with respect to identification, evaluation, or educational placement of the child;⁴⁵ (4) the right to mediation, on a voluntary basis, of any disputes involving these matters;⁴⁶ (5) and the right of any party dissatisfied after these procedures to bring a civil action in any state court or in a U.S. district court.⁴⁷

One significant problem with the IDEA arose when schools attempted to discipline disabled children by suspension or expulsion. Those that created the law feared that school administrators, in an effort to remove hard-to-educate children from their school systems, would categorize those children as having "discipline problems" and have them removed from school.⁴⁸ The legislation therefore prevented that opportunity for school officials; consequently, school officials complain that the IDEA protects disabled children from the disciplinary procedures that are customary for other students who engage in similar behavior.⁴⁹ School districts that have not followed these provisions have faced losing federal funds.⁵⁰ As this Note's examination of case law indicates, the issue of how to discipline disabled children under the IDEA became an important one.

C. How Would Courts Interpret the IDEA?

In the 1986 case, *Doe v. Maher*,⁵¹ two students who had been labeled as emotionally handicapped children and subsequently suspended for discipline

42. See 20 U.S.C.A. §1415 (West Supp. 1998).

43. See *id.* § 1415(b)(1).

44. See *id.* § 1415(b)(3).

45. See *id.* § 1415(b)(6).

46. See *id.* §§ 1415(b)(5), (e).

47. See *id.* § 1415(i)(2)(A).

48. See *Double Standard*, *supra* note 8.

49. See *id.*

50. See generally Donald P. Baker, *Va. Loses Suit on Schooling For Disabled; Suspended Students Need Education*, *Court Rules*, WASH. POST, June 21, 1996, at B3 (noting a school district in Virginia that refused to provide an alternative education for disabled students who had been suspended for discipline problems, risked losing \$50 million in federal funding, despite the state's contention that disabled children should be treated the same as other students).

51. 793 F.2d 1470 (9th Cir. 1986), *aff'd as modified sub nom.*, *Honig v. Doe*, 484 U.S. 305 (1988).

problems,⁵² complained that their suspension pursuant to the initiation of expulsion proceedings violated the Education for All Handicapped Children Act (the “Act”).⁵³ The Ninth Circuit not only agreed that the “stay-put” provision prevented schools from removing disabled students from their current placement pending disciplinary hearings,⁵⁴ it also ruled that the Act prohibited expulsion of a disabled student for any misbehavior that is a manifestation of the child’s disability.⁵⁵ However, the court clarified that where a child’s conduct is determined not to be substantially related to that child’s disability, the child may be expelled.⁵⁶

On appeal two years later, the U.S. Supreme Court qualified the *Maher* ruling somewhat. The Court granted certiorari in 1987⁵⁷ to decide whether, in view of the “stay-put” provision, which prevented school officials from removing disabled children pending any review process, those officials had any recourse for dangerous or disruptive disabled students.⁵⁸ The California Superintendent of Public Instruction urged the Court to recognize a “dangerousness” exception to the stay-put provision on the basis of either of two assumptions: “first, that Congress thought the residual authority of school officials to exclude dangerous students from the classroom too obvious for comment; or second, that Congress inadvertently failed to provide such authority and this Court must therefore remedy the oversight.”⁵⁹ In fact, the Court ruled that there is no “dangerousness” exception, saying, “[w]e think it clear . . . that Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school.”⁶⁰ Other disciplinary measures were available to school districts, the Court pointed out, such as the use of detention or restriction of privileges or suspensions of up to ten school days in drastic and imminently dangerous situations.⁶¹ However, the Court made it clear that a plain reading of the Act did not allow for suspension longer than ten days unless the school system could show in court that leaving the student in the current setting was “substantially likely to result in injury either to himself or herself, or to others.”⁶² The Ninth Circuit also had

52. *Id.* at 1476-77. One student had assaulted another student and had broken a school window; the other had made sexual comments to several female students. *See id.* at 1477.

53. *Id.* at 1478.

54. *Id.* at 1485-86.

55. *Id.* at 1481.

56. *Id.* at 1482 (citing, *inter alia*, *Kaelin v. Grubbs*, 682 F.2d 595, 602 (6th Cir. 1982); *S-1 v. Turlington*, 635 F.2d 342, 348 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981)).

57. 479 U.S. 1084, 1084 (1987).

58. *Honig v. Doe*, 484 U.S. 305, 308, 317 (1988).

59. *Id.* at 323.

60. *Id.*

61. *Id.* at 325.

62. *Id.* at 328. Yet, even in 1988, commentators knew that seeking court intervention would be seen as cumbersome for school officials. *See, e.g., Nadine Cohodas, Right to Bar Handicapped Students Limited*, 46 CONG. Q. WKLY. REP. 159, 159 (1988).

stated that a child might be denied a free appropriate public education when that child's misconduct was not related to his or her disability.⁶³ The Supreme Court did not discuss that issue on appeal, however, so for a time the only discussion on the subject was dicta and the rule was unclear as to whether a student could be suspended or expelled for behavior that was not a manifestation of his or her disability.

This was not the only court battle concerning methods for disciplining handicapped children in schools. Most disabled students and parents who challenged suspensions and expulsions succeeded in doing so.⁶⁴ Only a very small minority of courts, and for very detailed reasons, ruled that the right to a free appropriate public education could be forfeited when a disabled child broke school rules.⁶⁵

Therefore, these students remained in school with their non-disabled peers, virtually exempt from the disciplinary procedures to which the other children were routinely subject. The law did not seem to work for many school administrators, who complained that the IDEA was unreasonable in its limitations, thereby threatening the safety of other students and teachers.⁶⁶

It seems parents and administrators alike had good reason to be concerned for the way in which the IDEA compromised safety in schools. A double standard had developed, which gave special protection to disabled students who contributed to classroom disruption and violence, and placed a heavy burden on public schools.⁶⁷ Many examples exist, as where an adolescent with a suspected attention deficit disorder who had a pellet gun in his car at school could not be suspended pending administrative proceedings to determine whether he needed

63. *Doe v. Maher*, 793 F.2d 1470, 1482 (9th Cir. 1986). *See supra* note 56 and accompanying text.

64. *See, e.g., Kaelin v. Grubbs*, 682 F.2d 595, 601 (6th Cir. 1982) (holding that a disabled student's expulsion from school was an improper change in placement within the meaning of the Act); *Magyar v. Tucson Unified Sch. Dist.*, 958 F. Supp. 1423, 1435, 1443 (D. Ariz. 1997) (concluding that suspension of 175 days was a change in placement under the IDEA and schools must provide individualized educational services to all handicapped children during the period of time that they are suspended).

65. *See, e.g., Virginia v. Riley*, 106 F.3d 559, 561 (4th Cir. 1997) (holding that where a disabled student's misbehavior was not related to his or her disability, and the student is suspended or expelled, the IDEA did not impose an obligation to provide a free appropriate public education to that student); *Light v. Parkway C-2 Sch. Dist.*, 41 F.3d 1223, 1230 (8th Cir. 1994) (holding that the school district had met its burden by sufficiently rebutting the presumption in favor of the child's current educational setting, and by establishing that it made every reasonable effort to accommodate that child so as to mitigate any risk of injury before seeking court removal of the student).

66. *See Safe Schools, supra* note 4. As many as 78% of school principals surveyed by the National Association of Elementary School Principals criticized the IDEA for "unreasonably" limiting their ability to manage disruptive or dangerous special education children." *See also House Oks Discipline For Disabled Students*, MPLS-ST. PAUL STAR-TRIB., May 14, 1997, at 1A.

67. *See Discipline for Disabled*, SALT LAKE TRIB., May 24, 1997, at A14.

special education.⁶⁸

Another principal tried to suspend four students whom he found using methamphetamines.⁶⁹ Two were immediately suspended without difficulty for one year. One of the students was learning-disabled, so would not have been suspended at all, except that a special hearing officer found that his disability was not linked to his behavior. The school therefore suspended him for one year, but provided him with home tutoring at the school district's expense. The last student was determined to have behavior problems that caused his actions, and so received the maximum discipline possible for disabled students at that time—a ten day suspension.⁷⁰

Another example involves three high school students who robbed a pawnshop, beat the owner, and then brought stolen guns to a high school basketball game where all three were arrested.⁷¹ Two of the students were expelled. The third was a disabled student, so the school was required to provide a private tutor for an entire year while he was in jail awaiting trial.⁷²

Most school officials considered the *Honig* decision merely acceptable, but the ruling was a large victory for disabled-rights advocates.⁷³ Educating disabled children is as important as educating any other student; and putting disabled and non-disabled kids together in the classroom sounded like a good idea. It became clear, however, that no balance had been struck between providing the least restrictive educational setting for children with disabilities and protecting the rights of others attending or working in the school systems to a safe and peaceful environment. The rights of disabled students should not have been protected at the extreme cost to the interests of school officials in ensuring safe schools.⁷⁴

In addition, the Supreme Court in *Honig* did not address all the issues related to disciplining disabled school children. For instance, is the ten day suspension limitation maximized even when the ten days are not consecutive?⁷⁵ Also, what would be the profile of a child who was “substantially likely” to be highly dangerous to himself or others, if those are the only disabled students who could be denied schooling for longer than ten days? Overall, the IDEA was not well received by either school officials, or the parents and students it sought to protect because of its inflexibility in dealing with dangerous situations and its uncertain procedural applications.⁷⁶ Further, the *Honig* decision was not nearly as broad

68. See M.P. by D.P. v. Governing Bd., 858 F. Supp. 1044 (S.D. Cal. 1994).

69. See Kronholz, *supra* note 9.

70. See *id.*

71. See *id.*

72. See *id.*

73. See Cohodas, *supra* note 62, at 159.

74. See *id.* (recognizing that a balance of interests was intended).

75. See Eugene A. Lincoln, *Disciplining Handicapped Students: Questions Unanswered in Honig v. Doe*, 51 ED. LAW REP. 1, 4 (1989); Edward J. Sarzynski, *Disciplining a Handicapped Student*, 46 ED. LAW REP. 17, 24 (1988).

76. See Steven. S. Goldberg, *Discipline, Disability, and Disruptive Students: Honig v. Doe*, 44 ED. LAW REP. 495, 500 (1988).

as many had hoped.⁷⁷ The bottom line was that although disabled children were offered the same educational and social advantages as their non-disabled peers, the law still was not quite right.

II. CONGRESS FINALLY RESPONDS—1997 REVISIONS TO THE IDEA

Between 1979 and 1994, several amendments clarified and refined the IDEA. One of these amendments included awarding attorney's fees for parents who prevail in due process proceedings and other judicial actions against school districts.⁷⁸ Additionally, the Improving America's Schools Act of 1994⁷⁹ gave school officials the discretion to move disabled school children into an interim alternative educational setting for up to 45 days when those students bring firearms to school.⁸⁰

When Congress met in 1997, it looked toward further advancing the education of disabled school children. The Senate Committee on Labor and Human Resources and the House Committee on Education and the Workforce recommended the newest revisions to serve several purposes,⁸¹ including making schools safer.⁸² The Senate Committee reported that although the number of children originally denied an education had dropped by almost ninety percent, the law's promise had not been fulfilled for many children, because the quality of education for disabled students was below standard.⁸³ "Ensuring that schools are safe and conducive to learning" was one of the many ways Congress could improve the quality of education for disabled children.⁸⁴

Within this legislation, Congress finally clarified how to interpret the "stay-put" provision. As the Senate Committee noted, the legislation only included two exceptions to the "stay-put" rule: "where guns or drugs are involved, or when continued placement is substantially likely to result in physical harm."⁸⁵

77. See Sarzynski, *supra* note 75, at 22.

78. S. REP. NO. 105-17, at 2 (1997) (citing Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, § 2, 100 Stat. 796, 796 (codified as amended at 20 U.S.C.A. § 1415(i)(3)(B) (West Supp. 1998)). Other amendments included providing funds for State school programs that practice early intervention with infants and toddlers. *Id.* at 2-3 (citing Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99-457, § 101, 100 Stat. 1145, 1147 (codified as amended at 20 U.S.C.A. § 1433 (West Supp. 1998))).

79. Pub. L. No. 103-382, 108 Stat. 358 (codified as amended in scattered sections of 20 U.S.C.). This act was enacted with the goals of closing the educational gap between disadvantaged children and other children, and enabling schools to provide a high-quality education to all children. See *id.* § 101, 108 Stat. at 3519-22.

80. *Id.* § 314, 108 Stat. at 3936-37 (codified in 20 U.S.C.A. § 1415(k)(1)(A) (West Supp. 1998)).

81. S. REP. NO. 105-17, at 2 (1997); H.R. REP. NO. 105-95, at 82 (1997).

82. S. REP. NO. 105-17, at 2.

83. S. REP. NO. 105-17, at 5.

84. *Id.*

85. *Id.* at 4 (referring to Pub. L. No. 105-17, § 101, 111 Stat. 37, 94 (1997)). Although most

The Senate committee recognized that considerable debate had evolved around whether children with and without disabilities are equally disciplined for school-yard misbehavior and strove to find the proper balance.⁸⁶ The committee reported that the IDEA amendments were

the result of extensive discussions among Senators and Congressmen, and officials of the U.S. Department of Education, as well as recommendations from parents of children with disabilities, educators, and other individuals interested in improving the quality of education for children with disabilities. . . . The legislation was developed through a bicameral, bipartisan, legislative branch, executive branch collaborative effort that preceded committee action.⁸⁷

The proposed revisions passed both the House and Senate by overwhelming majorities.⁸⁸

President Clinton also recognized the importance of the revisions. He signed the legislation on June 4, 1997.⁸⁹ The President stated that he believed the legislation would build on the IDEA's prior success by, among other things, "asking children with disabilities, along with schools, teachers, and parents to assume greater responsibility for the children's success."⁹⁰ The President added that the bill "also gives school officials the tools they need to ensure that the Nation's schools are safe and conducive to learning for all children, while scrupulously protecting the rights of children with disabilities."⁹¹

Under new provisions of the IDEA, school personnel have the discretion to order a change in the placement of a child with a disability to an interim alternative educational setting for not more than ten days, to the extent that a child without a disability would be subject to the same.⁹² However, a disabled student who is subject to further disciplinary action may be transferred to an interim alternative setting for up to forty-five days if the student brings a weapon to school or to a school function or if the child "knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function."⁹³

of the procedural safeguards originally included in the IDEA remain in the new amendments, several refinements were made. *See id.* at 25.

86. *Id.* at 28.

87. *Id.* at 1-2.

88. The House of Representatives approved the amendments 420-3 on May 13, 1997; the Senate approved the measures 98-1 the following day. *See* Edwin Chen, *Senate Approved Landmark Education Bill For Disabled Congress*, L.A. TIMES, May 15, 1997, at A6.

89. Statement by President William J. Clinton Upon Signing H.R. 5, 1997 U.S.C.C.A.N. 147.

90. *Id.*

91. *Id.*

92. Individuals with Disabilities Education Act, 20 U.S.C.A. § 1415(k)(1)(A)(i) (West Supp. 1998).

93. *Id.* § 1415(k)(1)(A)(ii)(II).

If a child's change in placement is limited to forty-five days, and that child previously was being educated in a regular classroom, then after a maximum of forty-five days a child who has pointed a gun in his teacher's face will be back in that teacher's classroom. Should the school attempt further to change the disabled child's placement after forty-five days, the student will return to his or her original educational setting pending any proceeding to challenge the placement.⁹⁴ Further, an "interim alternative educational setting" is one provided by the school district and selected so the child may continue to participate in the general curriculum and receive the same educational services as those set out in the student's Individualized Education Program ("IEP").⁹⁵

The parents of any disabled child who is subject to suspension or change in an educational setting must be notified on the day the decision is made, and within ten days or "immediately if possible," a determination must be made as to whether the child's misconduct is related to his disability.⁹⁶ If the parents challenge a removal of their child from his or her current setting and during pendency of any review process or appeal, the child must remain in his or her "current educational setting," that is, the setting before disciplinary action.⁹⁷

As for any child who may be considered substantially likely to cause injury to himself, his classmates, teachers, or any other school personnel, a hearing officer may change that child's placement for up to forty-five days, but only if the school has demonstrated that likelihood by substantial evidence.⁹⁸ The newest revisions to the IDEA define substantial evidence as "beyond a preponderance of the evidence."⁹⁹ In addition, if the school district believes it is dangerous for the child to remain in his current setting pending any proceedings, it may request an expedited hearing.¹⁰⁰

Overall, Congress made some significant changes to the IDEA. In some ways school districts have more discretion to remove students with disabilities, if those students engage in certain acts of misconduct. At the same time, Congress clarified that the "stay-put" provision otherwise will be applied absolutely. In that sense, the revisions are basically a codification of much of the related case law from the last twenty years. Yet, throughout those years when the courts addressed such issues, educators complained of safety concerns.¹⁰¹ The question remains, are the 1997 revisions to the IDEA enough to satisfy teachers, administrators, and parents, without stepping on the rights of disabled students and their parents?

94. *Id.* § 1415(k)(7).

95. *See id.* § 1415(k)(3); *see also id.* § 1401(11).

96. *See id.* § 1415(k)(4)(A).

97. *See id.* § 1415(j). Even where the removal was due to possession or use of guns or drugs, the student will return to the original educational setting if no resolution occurs within 45 days. *See id.* § 1415(k)(7)(A).

98. *See id.* § 1415(k)(2)(A).

99. *Id.* § 1415(k)(10)(C).

100. *See id.* § 1415(k)(7)(C).

101. *See Kronholz, supra* note 9.

III. PUBLIC REACTION TO THE IDEA REVISIONS IS MIXED

Debate over the IDEA is not going to end any time soon. The people and interests that have been involved in shaping the IDEA thus far are, to some extent, adversarial, so it is not surprising that the reactions to the 1997 amendments are varied. Although it remains to be seen what effect the revisions will have on school discipline, the initial reaction is that they do not strike the balance of interests hoped for by many people.

A. Still Not Enough Discretion for School Officials?

Although the newest revisions to the IDEA may be fair and, for now, satisfactory, lobbyists on both sides of the issue failed to get exactly what they wanted.¹⁰² Congress will need to continue its efforts to balance “teachers’ needs to maintain a safe and orderly classroom environment with disabled students’ rights to equal access [to education].”¹⁰³ Many school representatives agree, cautioning that the new legislation does not go far enough to enable teachers to deal with handicapped students who are violent or seriously disruptive.¹⁰⁴

1. *Almost Getting Away With Murder?*—Many teachers and principals think that by failing to provide enough flexibility and safety precautions within the revisions, Congress did little to help them.¹⁰⁵ Although more clarity is certainly an advantage to school officials, many other behavioral problems exist aside from guns and knives. Fists and teeth can be just as dangerous to other students and teachers—at least one school principal had to order hepatitis shots for a teacher who was bitten by a special-education student.¹⁰⁶ In addition, classroom disruptions, robbery, assaults, sex offenses, and other problems are not excluded from the “stay-put” rule.¹⁰⁷ Yet advocates for the disabled oppose allowing sanctions for disruptive behavior because “it could be used against a large population of children.”¹⁰⁸

One student terrorized his school, “throwing punches, brawling, and, finally, breaking the nose of a male teacher-aid.”¹⁰⁹ The school principal could not suspend, expel, or transfer that student because the child had been diagnosed as emotionally disturbed. Instead, school officials were forced to hire a private teacher and a private aide to work with that child for the rest of the school year

102. See *IDEA Bill Passes Senate, Cleared For Clinton’s Signature*, CONGRESS DAILY, May 14, 1997.

103. *Id.*

104. See *Dealing with Disabled Students Series: Editorials; Issues in Education*, ST. PETERSBURG TIMES, Aug. 17, 1997, at 2D [hereinafter *Dealing with Disabled Students Series*].

105. See *id.*; see also Beck, *supra* note 13.

106. See Kronholz, *supra* note 9.

107. See *supra* notes 40-41, 92-101 and accompanying text.

108. Kronholz, *supra* note 9.

109. *Id.*

at a total cost of \$40,000—a cost borne by the school district.¹¹⁰ That is hardly the discipline that comes to mind when a child acts in such an unruly and destructive manner. Time, energy, and money was devoted to one disruptive individual, rather than a classroom full of children who follow school rules.

The IDEA defines “weapon” as defined in 18 U.S.C. § 930(g)(2): “[A] weapon, device, instrument, material, or substance . . . that is used for, or is readily capable of causing death or serious bodily injury.”¹¹¹ So disabled students who bite, scratch, and kick their teachers are never subject to the consequences—at least not the same consequences—as non-disabled students. The punishment often does not fit the crime. For example, two emotionally handicapped children who had plotted to kill their teacher will receive expensive, individual home instruction as their punishment.¹¹²

2. *Double Standard.*—The new legislation does not solve the problem of a “two-tiered system of discipline.”¹¹³ If a state wants to continue receiving federal funds for education grants, the double standard discipline system is forced upon school districts. After two students and their twelve friends attacked another student and shots were fired, a school official said:

It should have been easy. Our rules are clear and simple: Any student who participates in what we call a ‘mob assault’ will be expelled. Any student who brandishes a gun of any kind—even a starter gun—will be expelled. Except in this case it wasn’t a bit simple.¹¹⁴

Because the student who fired the shot had a mild speech impairment and was therefore protected under the IDEA,¹¹⁵ the school could not deny him a free appropriate public education.¹¹⁶ Although that student’s behavior did not relate to his disability, the school principal could not expel him—as he did the other student.¹¹⁷

School administrators want a single system of discipline for all students, although they see the changes in the IDEA as better than the previous law.¹¹⁸ The

110. *See id.*

111. 18 U.S.C. § 930(g)(2) (1994) (referred to at 20 U.S.C.A. § 1415(k)(10)(D) (West Supp. 1998)).

112. *See* Linda K. Wertheimer & Mike Berry, *Schools Find it Difficult to Punish Special Ed Students for Bad Behavior*, ORLANDO SENTINEL, Sept. 8, 1996, at A1. The two fourth-graders, who were protected by the IDEA, took a gun and knives to school in an attempt to further their plan. *See id.*

113. *Double Standard*, *supra* note 8.

114. Kristen J. Amundson, *Exceptions to the Rule; Why Schools Can’t Expel Some Troublemakers*, THE WASH. POST, Nov. 2, 1997, at C04.

115. *See id.*

116. *See id.*

117. *See id.*

118. *See* David Hess & Elsa C. Arnett, *House Votes for Greater Latitude in Disciplining Disabled Students*, HOUSTON CHRON., May 14, 1997, at 7.

gray areas that affect most teachers in most classrooms remain difficult.¹¹⁹ Those gray areas exist where disabled students disrupt the classroom and lives of others, but have not committed an offense that falls under an exception to the “stay-put” rule.¹²⁰

The discipline double standard extends even into other legislation. The Gun-Free Schools Act of 1994¹²¹ requires “local educational agencies to expel from school for a period of not less than one year a student who is determined to have brought a weapon^[122] to a school under the jurisdiction of local educational agencies in that State.”¹²³ However, the Gun-Free Schools Act specifically mandates that “[t]he provisions of this section shall be construed in a manner consistent with the Individuals with Disabilities Education Act.”¹²⁴ That means a child with disabilities can be suspended for forty-five days, all the while receiving educational instruction at the extra expense of the school district.¹²⁵

States and local school districts also have adopted their own “zero-tolerance” policies, many going so far as to immediately expel students who bring weapons or drugs to school.¹²⁶ And at least one state supreme court has ruled that a “right to education” does not apply to any one individual student, but to children of the state generally, therefore allowing the school district to completely deny an educational setting to a child under zero-tolerance policies.¹²⁷ That attitude does not apply to disabled students, however, as *Honig* makes quite clear.¹²⁸ “Unfortunately, the special protections given to disabled children under court decisions or legislation do not generally apply to other youths facing charges, no matter how educationally or personally vulnerable they may be.”¹²⁹

119. See *id.* See generally *Double Standard*, *supra* note 8; *Inclusion A New Idea: Legislation Goes to President*, 7 AM. POL. NETWORK DAILY REP. CARD, May 16, 1997 (quoting Sandra Feldman, president of the American Federation of Teachers, who called this double standard “unfortunate,” saying that in the past it has led to serious consequences).

120. See Hess & Arnett, *supra* note 118.

121. 20 U.S.C. § 8921 (1994).

122. Weapon is defined here as “(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device.” 18 U.S.C. § 921(a)(2) (1994).

123. 20 U.S.C. § 8921(b)(1) (1994).

124. *Id.* § 8921(c). See also *Magyar v. Tucson Unified Sch. Dist.*, 958 F. Supp. 1423, 1441 (D. Ariz. 1997) (noting also that the Gun-Free School Zones Act requires school districts to continue providing appropriate educational services for disabled students during the time of discipline).

125. See Kronholz, *supra* note 9.

126. See Robert D. Shepherd, Jr. & Anthony J. DeMarco, *Weapons in Schools and Zero Tolerance*, 11-SUM CRIM. JUST., Summer 1996, at 46, 46.

127. *Id.* at 47 (citing *Doe v. Superintendent of Sch.*, 653 N.E.2d 1088 (D. Mass. 1995)).

128. *Honig v. Doe*, 484 U.S. 305 (1988); see *supra* notes 57-63 and accompanying text. See also Shepherd & DeMarco, *supra* note 126, at 47-48.

129. Shepherd & DeMarco, *supra* note 126, at 48.

Federal legislation certainly cannot sort out every possible disciplinary circumstance. It would be better to give teachers and principles the discretion needed to make on the spot decisions; to give them the authority to apply the IDEA with flexibility, especially now that three fourths of disabled children are taught in the regular classroom.¹³⁰ Now, schools' hands are still tied when caught between the need to maintain classroom order and the legal requirement to teach a disturbed child.¹³¹ Protecting the rights of some groups means compromising the rights of others.

3. *Expensive Discipline*.—It is important to remember that whether or not a student's misbehavior is related to that student's disability, no child under the IDEA may be denied a free appropriate public education for any reason.¹³² This often will result in private home tutoring, which is costly for the school system and provides unruly children with many hours of specialized attention.¹³³ In fact, according to the U.S. Education Department, the program has increased to a cost of \$39 billion a year.¹³⁴ The cost of these individualized tutoring sessions often takes money away from other students, in addition to the costs involved with using a team of teachers, parents, psychologists, and other specialists to prepare the disabled student's IEP.¹³⁵ This is the case even where a student gets drunk, barges into school in the middle of the day to terrorize teachers and students, leaving vomit and other bodily fluids on staff members, and frightening children as young as thirteen years old.¹³⁶

4. *A Legal Nightmare*.—To implement any disciplinary procedure against a child with disabilities is a legal nightmare; it is a legal maze that frustrates the ability to discipline at all.¹³⁷ Teachers and school officials who are faced with those discouraging processes might be tempted to give up and simply allow

130. See *House Oks Discipline For Disabled Students*, *supra* note 66.

131. See *As Barriers Fall*, CHRISTIAN SCI. MONITOR, May 22, 1997, at 20. See also Chen, *supra* note 88 (noting that the American Association of School Administrators does not believe the revisions go far enough in the area of discipline); Tait Trussell, *A Welcome Crackdown on Special-Education Abuses*, ORLANDO SENTINEL, May 16, 1997, at A23 (reporting that the National School Boards Association declared that the "current inflexible restrictions and costly mandates" of the IDEA should be replaced by "balance and common sense . . . so that all children will benefit").

132. The IDEA states that even where a student's misconduct is unrelated to his or her disability, a school may only deny a free appropriate public education for up to 45 days. 20 U.S.C.A. § 1415(k) (West Supp. 1998).

133. See Wertheimer & Berry, *supra* note 112.

134. See Beck, *supra* note 13.

135. See *Federal Education Programs Evaluation: Field Hearing Before the Subcomm. on Oversight and Investigations of the Comm. on Educ. and the Workforce*, 105th Cong. (1997) [hereinafter *Field Hearing*] (testimony of John Pennycuff, Vice Pres., Winton Woods City District Bd. of Educ.); see also *supra* note 95.

136. See *Field Hearing*, *supra* note 135 (testimony of John Pennycuff). That school district was forced to take \$20,000 in funds away from other students to pay for a teacher to go to that student's home daily.

137. See Bruce Fein, *Handicapping Education*, WASH. TIMES, May 20, 1997, at A18.

questionable behavior to continue. After the legislative revisions were passed, at least one advocacy group for children with disabilities expressed concern that the procedural requirements create too much paperwork for teachers.¹³⁸

Virtually every decision made by school officials is subject to review, and by the time the required review process is completed, a student may have graduated and therefore escaped a suspension or expulsion completely. A review must immediately be held to determine whether the child's misbehavior relates to his or her disability.¹³⁹ This review is performed by the IEP Team,¹⁴⁰ which considers all information relevant to the behavior subject to discipline, including evaluation and diagnostic results, observations of the child, and the child's placement and IEP.¹⁴¹ The IEP Team then determines whether all appropriate services were offered to the student, including supplementary aids and services and behavior intervention strategies.¹⁴² The IEP Team must also consider whether the child's disability impaired the child's ability to understand the impact and consequences of the behavior, and to control his or her behavior.¹⁴³ After this review, if the school is able to discipline the child through suspension, all special education and disciplinary records must be sent to the individual making the final decision.¹⁴⁴

Following any disciplinary action, the parents may appeal the determination that the student's misbehavior was related to the disability, or may appeal any interim alternative educational setting.¹⁴⁵ A hearing officer will investigate and make a proper ruling.¹⁴⁶ Throughout all of these processes, the child will remain in his original educational setting unless the school district can show, by substantial evidence, in an expedited hearing, that the child is a threat.¹⁴⁷ As the Court explained in *Honig*, the IDEA "establishe[d] a comprehensive system of procedural safeguards designed to ensure parental participation in decisions concerning the education of their disabled children and to provide administrative and judicial review of any decisions with which those parents disagree."¹⁴⁸

Sometimes the battle between parent and school extends to the issue of whether a child is even disabled. The IDEA now gives school districts a wide basis for knowledge of a child's disability.¹⁴⁹ If the school has no basis for

138. *Bill Helps Schools Balance Needs of All Children*, SAN ANTONIO EXPRESS-NEWS, May 12, 1997, at 14A.

139. See 20 U.S.C.A. § 1415(k)(4) (West Supp. 1998).

140. See *id.* § 1415(k)(4)(B); see also *supra* note 95.

141. See 20 U.S.C.A. § 1415(k)(4)(C)(i) (West Supp. 1998).

142. See *id.* § 1415(k)(4)(C)(ii).

143. See *id.*

144. See *id.* § 1415(k)(5)(B).

145. See *id.* § 1415(k)(6)(A)(i).

146. See *id.* § 1415(k)(6)(B).

147. See *id.* § 1415(k)(7).

148. *Honig v. Doe*, 484 U.S. 305, 308 (1988).

149. 20 U.S.C.A. § 1415(k)(8) (West Supp. 1998). The IDEA will treat a school as having knowledge that a child is disabled if: (1) the parent has given written acknowledgment that the

knowledge of a disability, it may attempt to discipline the student as it would any other.¹⁵⁰ However, the parents of the student may request an evaluation, conducted in an expedited manner.¹⁵¹ Meanwhile, at least one court has held that disciplinary measures do not have to be delayed pending resolution of a parent's claim that a student should be classified as disabled.¹⁵²

B. Too Far and Too Much?

Although advocates for the disabled are generally satisfied with the IDEA amendments of 1997, their tone still seems to be one of warning—the concessions made could be the beginning of a slippery slope, ending with the ability of school officials to expel disabled students just to be rid of them. Advocates fear that too much flexibility in the law would tempt school districts to “routinely dump disabled kids.”¹⁵³ This fear probably stems from the way in which some school districts had “turned away severely handicapped youngsters or expelled some emotionally disturbed kids with the excuse that they could not ‘fit into’ regular classes.”¹⁵⁴ While parents of children with disabilities would not think any student should be allowed to bring guns and drugs to school, they believe that the IDEA is needed to prevent some school administrators from finding any reason to expel a disruptive child.¹⁵⁵

Advocates for the disabled have lobbied heavily against most of the amendments to the discipline provisions over the years.¹⁵⁶ It seems clear that those who fight for the rights of students with disabilities fear a reversion to a time when those children were excluded from public schools. One advocate noted: “Our concern is once they start weakening the protections for the students to continue to get the education, other rights are going to deteriorate.”¹⁵⁷ It has been suggested that teachers and administrators have an ultimate goal of “making it easy to disregard students who are too expensive or too difficult to educate.”¹⁵⁸ If some school officials really do have such motives, the IDEA keeps them from depriving disabled students of the social, emotional, and educational advantages

child needs special education; (2) the child demonstrates a need for special education; (3) the parent requests evaluation of the child; or (4) a teacher or other school employee brings the child's behavior or performance to the attention of the special education director. *Id.*

150. *See id.* § 1415(k)(8)(C).

151. *See id.*

152. *See, e.g.,* *Miller v. Board of Educ.*, 690 A.2d 557, 560 (Md. Ct. Spec. App. 1997).

153. *Dealing with Disabled Students Series*, *supra* note 104.

154. Beck, *supra* note 13.

155. *See* Cathy W. Heizman, *No Discrimination*, CINCINNATI ENQUIRER, June 3, 1997, at A9.

156. *See* Kronholz, *supra* note 9.

157. Wertheimer & Berry, *supra* note 112 (quoting Carolyn Tavel, Executive Dir. of the Learning Disabilities Resource Ctr., a Florida organization representing parents of disabled children).

158. Mike Ervin, *Getting Tough on Kids in Wheelchairs*, THE PROGRESSIVE, Nov. 1, 1995, at 27.

of being with other children.¹⁵⁹

Not all school officials look for reasons to remove disabled students from their schools. Some of them do not experience the severe problems and horror stories that seem so prevalent. Those reports may stem from a perceived need by some education organizations to respond to complaints from their constituents.¹⁶⁰ Quite possibly, some advocates believe, the criticisms of the IDEA are overstated and cannot be supported by facts beyond the infamous anecdotes.¹⁶¹

Besides, it is argued, the IDEA legislation aimed to ensure disabled students' equal access to education, not to "coddle those students or protect them from punishment if they broke the rules."¹⁶² Also, the IDEA is helpful for children who are not disabled, as it helps teach everyone not to categorize people, but to accommodate each child as an individual.¹⁶³ However, schools must follow the rules, just as they expect their students to do the same,¹⁶⁴ and whatever legislation has been created to protect the rights of some students, school officials must follow or they will face consequences of their own—loss of federal funds.

C. *Between A Rock and A Hard Place*

Clearly, school districts are caught between two duties—to provide a free appropriate public education for children with disabilities, and keep schools fair, safe, and conducive to learning for all children. The rights of all children, teachers, and administrators must be balanced.¹⁶⁵ Perhaps the most important of those rights is safety in the school systems.¹⁶⁶

1. *What Do We Want to Teach the Children?*—Making disciplinary concessions for children with disabilities may be sending a message that no one expects them to live up to the same standards as their peers.¹⁶⁷ We should be teaching children that certain opportunities are forfeited by criminal conduct or conduct that goes against the principles of that opportunity.¹⁶⁸ Violence in schools is too big a problem to make exceptions for certain students. Disabled students who fight, steal, make sexual attacks, and are otherwise destructive should not be left in the classroom to strike again. No students—disabled or

159. See *Disability and Discipline*, *supra* note 4.

160. See *Revision of Special Education Programs: Congressional Testimony on H.R. 5 Before the Subcomm. on Early Childhood, Youth, and Families*, 105th Cong. (1997) [hereinafter *Congressional Testimony*] (testimony of Elisabeth T. Healey, School Dir. of the Pittsburgh Bd. of Educ.).

161. See *id.*

162. *Following the Rules*, TENNESSEAN, June 12, 1997, at 18A.

163. See Amundson, *supra* note 114.

164. See *Following the Rules*, *supra* note 162.

165. See *Bright Idea for Students With Disabilities*, ST. LOUIS POST-DISPATCH, June 8, 1997, at 2B.

166. See *Safe Schools*, *supra* note 4.

167. See Amundson, *supra* note 114.

168. See *id.*

not—will be able to learn if classroom disruptions and school-yard bullying are permitted to continue.

Moreover, the IDEA makes disciplinary exceptions out of children with all sorts of disabilities, and several of the disabilities covered under the IDEA seem to have little to do with a child's ability to obey school rules or to behave himself or herself the same as other children.¹⁶⁹ In fact, children with learning, speech or language problems make up about seventy-two percent of school children with disabilities.¹⁷⁰ Rating disabilities according to their seriousness is not a task for a lay person, but maybe some difference should be recognized between more mild disabilities and those that are more likely to keep a child from learning rules or understanding right from wrong. Should a child with dyslexia or a hearing impairment be any more excused from facing the consequences of his or her actions than any other student? As one commentator suggests, the reasoning is as follows: "If a kid is a bully, that must mean he has an emotional problem; if he has an emotional problem, it qualifies him as disabled; if he's disabled, he cannot be punished or even be removed from a classroom without a huge federal civil rights hassle."¹⁷¹

Indeed, what makes misbehavior any more excusable when it comes from a child with a mild speech impairment than when it comes from a non-disabled child who might simply be a "bad apple" or is just looking for some extra attention? Maybe the key is to teach all children that adversity is not an excuse for disrespectful, or even dangerous, behavior.

2. *Equality in Education?*—If the goal of the IDEA is to provide equal educational opportunities for all students, perhaps all students, disabled or not, should be provided alternative education when they are suspended. Why should we put any troubled or misbehaving kid out on the streets? It seems counterproductive to deny schooling to any child.¹⁷² When considering the future of our youth and community, it would be in everyone's interest to seek interim alternative education for *all* students who are temporarily removed from the regular classroom setting.¹⁷³ Realistically, however, the costs involved would soar above the current costs of providing such alternatives for only a percentage of students. Undertaking such an expense likely would be almost impossible.

This entire issue revolves around social objectives. Promoting a policy of denying educational services for students who bring weapons or drugs to school will bring about minimal good, regardless of whether the suspended students are disabled. Even Congress, by introducing the Violent and Repeat Juvenile Offender Act of 1997 legislation,¹⁷⁴ has considered the goal of "encourag[ing] and promot[ing] programs designed to keep in school juvenile delinquents

169. See *supra* note 29 and accompanying text.

170. See Kronholz, *supra* note 9.

171. Paul Carpenter, *Feds Develop a Great Idea to Alter IDEA*, ALLENTOWN MORNING CALL, May 13, 1997, at B1.

172. See Shepherd & DeMarco, *supra* note 126, at 48.

173. See *id.*

174. S. 10, 105TH CONG. (1997).

expelled or suspended for disciplinary reasons.”¹⁷⁵ Expelling any child who has brought drugs or weapons to school for an entire year is likely to deter that child from ever returning to school.¹⁷⁶

The bottom line is that the disciplinary provisions of the IDEA contaminate the entire objective of treating students equally. The IDEA may be an excellent tool for teaching non-disabled children to live and work with people who are not like them. However, any examples of equality are also defeated by the same legislation: “[I]t condescends and encourages persistent stereotyping of the disabled, which is what they purportedly protest.”¹⁷⁷

3. *Some Alternatives.*—If the current law does not provide equal educational opportunities for subjects of disciplinary actions, and doing so would be too expensive, the search for alternatives should continue. School districts may try other strategies, such as keeping skilled behavior specialists on staff who are trained in positive behavioral programs.¹⁷⁸ Perhaps such programs could focus on helping disabled school children cope with school and social stresses, or offer them positive incentives for remaining in the classroom with their non-disabled peers. This option, too, will incur costs, but in the long run distributing a portion of education funding to this type of program may produce a more positive result than hiring home tutors for children who are suspended from school.

One commentator suggests that simplicity is the key.¹⁷⁹ Rather than the extensive language in the IDEA that directs disciplinary procedures, two easy provisions might have provided the desired effect: (1) require use of “reasonable professional standards and judgment;” and (2) grant parents of disabled children a legal right to double damages and attorney fees “if the misconduct that prompted the discipline was caused by the school’s unreasonable neglect to treat or accommodate the disability.”¹⁸⁰ This suggestion, however, fails to define “reasonable professional standards” and overlooks the litigation that would likely ensue regarding the ambiguous nature of the two rules. Simplicity may not be an option.

Before Congress approved the 1997 revisions to the IDEA, some further alternatives may have been possible. For example, schools could have raised teacher accountability, government could have given discretionary grants directly to school systems to make positive lasting changes that meet the needs of that school, and everyone could have more actively enforced the law as it stood.¹⁸¹ However, even with the amendments in effect, these suggestions are not altogether moot. Raising teachers’ accountability might include raising those teachers’ expectations of children with disabilities. Low expectations may be preventing disabled children from developing incentives to remain in regular

175. S. REP. NO. 105-108 (1997).

176. See *Congressional Testimony*, *supra* note 160 (testimony of Elisabeth T. Healey).

177. Fein, *supra* note 137.

178. See *Congressional Testimony*, *supra* note 160 (testimony of Elisabeth T. Healey).

179. See Fein, *supra* note 137.

180. *Id.*

181. See *Congressional Testimony*, *supra* note 160 (testimony of Elisabeth T. Healey).

classrooms or to do well in school generally.¹⁸² In conjunction, if discretionary grants were awarded directly to school systems, schools may use funds to train teachers with the skills to work with students who have a broad range of learning skills.¹⁸³ And some improvements could be made by going all the way back to where the teachers were educated—universities offering education degrees could spend more time educating its own students on how to teach in a classroom that includes children with disabilities. Alternatives such as these would require less involvement from Congress and the courts and would eventually give schools more autonomy in their treatment of students with special needs.

Special education funding could find several other useful purposes aside from private instruction. At least one commentator has suggested looking to Congress to find more money within the IDEA to fund counseling and other special education in the hopes of reducing the need for suspension and expulsion.¹⁸⁴ At least one other commentator would push Congress to use more funds for prevention and early detection of disabilities, rather than trying to remedy the problem later.¹⁸⁵ In fact, in a May 1997 report, Congress stated its intent to use IDEA funding for research, personnel preparation activities, and outreach programs that would “improve early intervention, educational, and transitional results for children with disabilities.”¹⁸⁶ Clearly, Congress is aware that more improvements in the education of disabled children are not only preferable, but achievable. The far-reaching effects of a preventive approach would hopefully nullify the need for much of the present language in the IDEA and, most importantly, eliminate the currently perceived need to repair damage already done.

V. THE FUTURE OF THE IDEA

The potential exists for litigation to continue to flourish in the issues related to whether students with disabilities may be denied a free appropriate public education. Already, it seems that with such extreme procedural processes, determinations of whether a student is truly disabled, and further, whether a student's misconduct was related to his disability, are issues which courts will continue to face. As historical data show, these procedural guarantees may be necessary to prevent school districts from excluding special education students

182. *See id.*

183. *See id.*

184. *Dealing With Disabled Student Series*, *supra* note 104.

185. Beck, *supra* note 13.

186. H.R. REP. NO. 105-95, at 363 (1997). Congress hopes to achieve early intervention, education, and transitional results a number of ways, including: (1) providing national technical assistance, support, and information dissemination activities, *id.* at 375; (2) providing parent training and information activities, *id.*; (3) requiring the Secretary of Education, through grants, contracts, or cooperative agreements, to assess the progress of state programs in achieving goals such as early intervention services for infants and toddlers with disabilities, *id.* at 371.

altogether.¹⁸⁷ Regardless, a student who is dangerous to others should not remain in the classroom where that student can continue to harm others. Even when a child's misbehavior is disability-related, that child is no less a threat to his fellow students and teachers than when that nexus does not exist.

Another issue that often arises, is whether administrative remedies have been, or should be, exhausted by parents and students who protest suspensions and expulsions. Some courts have already held that where parents have failed to exhaust their administrative remedies under the IDEA, their court claims for IDEA violations fail for want of jurisdiction.¹⁸⁸ Litigation of that issue will only increase with the addition of procedural reviews.¹⁸⁹

If violence in schools continues to increase in coming years to the degree it has since enactment of the IDEA, further compromise will be needed. Both school officials and advocates for disabled students must be willing to recognize that as societal and environmental changes affect school systems, legislation like the IDEA will also require another look. No amount of national objectives will solve violence problems if exceptions are continually made. Teachers, school administrators, and parents of children without disabilities need to continue their fight for equal discipline in schools and work together to reach the compromises that are ultimately best for the students. Maybe those who design educational programs for children with disabilities will be "more rigid" with their educational plans,¹⁹⁰ thereby preventing a disabled child from undertaking an educational challenge beyond his or her reach. The IDEA can work well for everyone—Congress has spent twenty-two years perfecting it.

The underlying purpose of the IDEA is a good one. The Senate Committee on Labor and Human Resources intended for the 1997 legislation to

encourage exemplary practices that lead to improved teaching and learning experiences for children with disabilities, and that in turn, for these children, result in productive independent adult lives, including employment. Through these efforts, the committee intends to assist States in the implementation of early intervention services for infants and toddlers with disabilities and their families, and support the smooth

187. See *supra* notes 13, 153-54 and accompanying text.

188. See, e.g., *Bills v. Hommer Consol. Sch. Dist. Number 33-C*, 959 F. Supp. 507, 511 (N.D. Ill. 1997) (noting that exhaustion of administrative remedies is required for several reasons); *Brown v. Metropolitan Sch. Dist.*, 945 F. Supp. 1202, 1206 (S.D. Ind. 1996) (holding that although plaintiffs may have exhausted administrative remedies under the state pupil discipline statute, they did not do so under the IDEA because they did not request a due process hearing and pursue the appeals process); *but see Hayes v. Unified Sch. Dist. No. 377*, 877 F.2d 809, 814 (10th Cir. 1989) (stating that exhaustion of administrative remedies under the IDEA is not required "if adequate relief is not reasonably available or pursuit of such relief would be futile").

189. See *supra* notes 96-100 and accompanying text for discussion on the additional review proceedings included in the 1997 amendments to the IDEA.

190. See *Cohodas, supra* note 62, at 159 (quoting Gwendolyn Gregory, Deputy Gen. Counsel of the National Sch. Bds. Ass'n).

and effective transition of these children to preschool. The committee views the structure and substance of this legislation as critically important, if the country is to see clearer understanding of, and better implementation and fuller compliance with, the requirements of IDEA.¹⁹¹

No one knows where public education would be now if the IDEA had never been enacted. It is likely that many children with disabilities would still be marginalized or completely excluded from public schools. Without a doubt, the IDEA remains in the future of education law, but will require continuing reflection by lawmakers and those affected by the act. If interested groups do not continue to stay knowledgeable about the widespread effects of the IDEA and maintain the public awareness of the direction of the law, educational progress in this country could be seriously impeded. It is unlikely, however, that advocates of involved groups will allow the IDEA to swallow the rights of any children, parents, teachers or school officials without putting up a fight.

CONCLUSION

The IDEA amendments have the potential to make great strides in education law, and probably have already done so. Without the IDEA, children with disabilities quite possibly still would be systematically excluded from the opportunity to be educated alongside their peers. Any time this much is at stake, an agreement will not be easily achieved. The IDEA is rooted in good intentions and important goals for remedying past wrongs. But in correcting the historical mistakes of school officials, its protections for children with disabilities are extreme. Of course, the IDEA consists of much more than restrictions on disciplinary measures, but the disciplinary provisions have been cause for alarm for many years.

The 1997 revisions definitely are a step in the right direction, and for now, may be the best compromise for the important rights that lie on both sides of the issue. These changes answer many of the questions that the courts have been attempting to answer for over twenty years. With constant monitoring and reaction, this legislation could be just the right tool for protecting those rights—those of children with disabilities and those of all teachers and students who desire a safe place to learn. Although reaction of advocates on both sides is the key to shaping the IDEA into the most effective legislation it can be, everyone involved must be unselfish in their desires and willing to try new programs and ideas. The court in *Maher* said it well: “[T]hose who love their children must sometimes make sacrifices in order to accommodate the interests of other children and their equally loving parents, and . . . those of us who administer the law must recognize the limits of our capacity to achieve perfect justice.”¹⁹²

The goals of the IDEA are positive. The funding incentives for states to

191. S. REP. NO. 105-17, at 5-6 (1997).

192. *Doe v. Maher*, 793 F.2d 1470, 1476 (9th Cir. 1986), *aff'd as modified sub nom.*, *Honig v. Doe*, 484 U.S. 305 (1988).

create learning opportunities for children with disabilities are needed, but until teachers and school administrators find other incentives to include children with disabilities in their schools—such as fostering an environment where children with a broad array of backgrounds learn to work together—the goal of safe schools with a learning-conducive environment is still far from real. At the same time, the “guarantee” of a free appropriate public education should not be read so literally. That guarantee should come with certain qualifications—such as obeying state and school rules and learning that consequences follow from certain behaviors. Public schools cannot continue to compromise the safety of their teachers and students. The results could range from losing good teachers to losing good students to private schooling.

The increased amount of discretion provided by the newest changes in the IDEA, if given some time to be tested within the school districts, might be just what school officials need to improve education for all students. But at this time, no one should rule out the possibility that the courts will continually be called upon to resolve disputes created by language in the IDEA. Neither is Congress probably finished perfecting this act. Eventually, Congress will be called upon to make further revisions in light of public policy demands and changing educational environments. Perhaps future contouring of the IDEA will form it into an effective educational tool for *all* students.

